

Boston University School of Law

## Scholarly Commons at Boston University School of Law

---

Faculty Scholarship

---

7-2013

### Against Agnosticism: Why the Liberal State Isn't Just One (Authority) Among the Many

Linda C. McClain

*Boston University School of Law*

Follow this and additional works at: [https://scholarship.law.bu.edu/faculty\\_scholarship](https://scholarship.law.bu.edu/faculty_scholarship)



Part of the [Constitutional Law Commons](#)

---

#### Recommended Citation

Linda C. McClain, *Against Agnosticism: Why the Liberal State Isn't Just One (Authority) Among the Many*, 93 Boston University Law Review 1319 (2013).

Available at: [https://scholarship.law.bu.edu/faculty\\_scholarship/114](https://scholarship.law.bu.edu/faculty_scholarship/114)

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact [lawlessa@bu.edu](mailto:lawlessa@bu.edu).



# **AGAINST AGNOSTICISM: WHY THE LIBERAL STATE ISN'T JUST ONE (AUTHORITY) AMONG THE MANY**

*93 Boston University Law Review* 1319 (2013)  
*Boston University School of Law Public Law & Legal Theory Paper No. 13-54*  
(December 10, 2013)

**Linda C. McClain**  
Boston University School of Law

This paper can be downloaded without charge at:

<http://www.bu.edu/law/faculty/scholarship/workingpapers/2013.html>

---

## AGAINST AGNOSTICISM: WHY THE LIBERAL STATE ISN'T JUST ONE (AUTHORITY) AMONG THE MANY

LINDA C. MCCLAIN\*

INTRODUCTION .....	1320
I. SOME POINTS OF AGREEMENT.....	1322
A. <i>Our Constitutional Order Assumes Multiple Sites of         Sovereignty</i> .....	1322
B. <i>Government May Use Persuasion to Express Its Views –         and to Cultivate Values and Virtues</i> .....	1323
C. <i>Religion in the Public Square? Yes and No</i> .....	1325
II. POINTS OF DISAGREEMENT OR UNCERTAINTY .....	1328
A. <i>Agnosticism as Part of Our Constitutional Order?</i> .....	1328
B. <i>How Does the Double Balancing Process Work?</i> .....	1330
III. CHILDREN.....	1335
A. <i>Fractured Authority and the Place of Children</i> .....	1336
B. <i>How Do Children Fare in Greene's System of         Accommodating Plural Obligations?</i> .....	1340
1. Cases and Contexts Greene Discusses.....	1340
a. <i>Partial Exit</i> .....	1340
b. <i>Education and Illiberal Groups</i> .....	1342
2. One Case Greene Does Not Discuss: The Relationship Between the Authority of Government and the Authority of Nomic Communities Concerning the Abuse of Children .....	1344
a. <i>Child Sex Abuse in the U.S. Roman Catholic                 Church</i> .....	1346
b. <i>Child Sex Abuse at Penn State</i> .....	1352
c. <i>Child Sex Abuse in Other Nomic Communities</i> .....	1358

---

\* Professor of Law and Paul M. Siskind Research Scholar, Boston University School of Law. This Article originated as a paper delivered at the *Boston University Law Review* Book Symposium, held on November 8, 2012, on Abner Greene's *Against Obligation: The Multiple Sources of Authority in a Liberal Democracy* and Louis Michael Seidman's *On Constitutional Disobedience*. I thank Abner Greene for useful discussion at that event concerning my paper and his book. I also thank the 2012-2013 Faculty Fellows in the Boston University School of Theology Religion Fellows Program for their valuable comments when I presented a draft of this Article. Thanks, as always, go to Stefanie Weigmann, Head of Legal Information Services at the Pappas Law Library, for help with research. I am also grateful to Boston University for a summer research grant that supported this project. Thanks to Marci Hamilton for help with sources.

CONCLUSION.....	1361
-----------------	------

## INTRODUCTION

In *Against Obligation: The Multiple Sources of Authority in a Liberal Democracy*, Professor Abner Greene throws down the gauntlet to those scholars, politicians, and activists who believe that realizing the ideal of *e pluribus unum* (out of many, one) as well as constitutional principles of liberty and equality require a robust role for government. Government, he argues, is just one source of authority among many others, and citizens – or even public officials – have no general moral duty to obey the law. The political and constitutional order of the United States, he contends, is profoundly antifoundationalist. It distrusts “concentrated power” and so fractures and divides power in many ways, providing “multiple and overlapping checking mechanisms.”<sup>1</sup> In a memorable phrase, Greene states: “Our constitutional order is one of multiple repositories of power.”<sup>2</sup>

An attendant idea in his book is a conception of how the citizens within this constitutional order live and form beliefs. The state’s laws are by no means the only norms by which we live. “Many of us,” Greene explains, “adhere” to other norms – “religious, philosophical, family/clan/tribal, etc.” – and there is “no good reason” to treat those norms as “subservient to the law.”<sup>3</sup> The state, as his subtitle intimates, is simply one source of authority and values among many and has no special claims upon us: “We should see all of our sources of value, of how to live, as at least presumptively on par with each other, as equal, even though in some circumstances we’ll have to let our separate norms go and adhere to the law.”<sup>4</sup> To invoke a term at the core of the recently healed Great Schism of 1054 between the Orthodox and the Catholic Church over the status of the “bishop of Rome,” the state is not “*primus inter pares*” – first among equals.<sup>5</sup> To the contrary, it is one among many: it must compete for the loyalty of the people, who are not only citizens (at least the subjects of Greene’s book are), but are also members of families, religious institutions, voluntary

<sup>1</sup> ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* 3 (2012).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.*

<sup>5</sup> See Ray Ryland, *Peter and the Eastern Orthodox*, CATH. ANSWERS MAG., <http://www.catholic.com/magazine/articles/peter-and-the-eastern-orthodox>. (last visited June 9, 2013). The healing of the schism evidently occurred in November 2007, when a “joint commission of Orthodox and Catholic theologians . . . agreed that the Pope has primacy over all bishops, though disagreements about the extent of his authority still continue.” *Orthodox Recognize Pope First Among Equals, Disagreements Remain*, CATH. NEWS AGENCY (Nov. 15, 2007, 11:11 AM), [http://www.catholicnewsagency.com/news/orthodox\\_recognize\\_pope\\_first\\_among\\_equals\\_disagreements\\_remain](http://www.catholicnewsagency.com/news/orthodox_recognize_pope_first_among_equals_disagreements_remain).

associations, and the like. To be sure, the state has some resources it can marshal to “expose” its citizens to – and try to persuade them in favor of – its views and values.<sup>6</sup> Because sources of sovereignty are multiple and people recognize many sources of obligation, however, citizens who wish to live by norms other than those of the state must be allowed to do so and should remain “free from the clutches of the state,” at least “to the fullest extent compatible with the stable operation of government and the liberty of other persons.”<sup>7</sup> Greene explains this in terms of “accommodating our plural obligations” and lays out a robust right to exemptions from the demands of the state – a more realistic right of “exit” than simply leaving the jurisdiction.<sup>8</sup>

Why should the state be so accommodating to people who wish to “depart from law and live by their own lights”?<sup>9</sup> Greene asserts several baselines. Of particular interest for purposes of this Article is the baseline of doubt concerning “whether we (even comprehensive liberals) have reached the truest or best answers regarding the just or the good.”<sup>10</sup> Greene refers to the need for humility on the part of the state as to whether it has the right answers, an agnosticism about virtue. In this Article, I will take up the gauntlet that Greene throws down and argue against such agnosticism as well as against his relegation of the state to simply one source of authority in competition with others. As someone who has argued that government should play a robust role in fostering persons’ capacities for democratic and personal self-government and in promoting public and constitutional values, I am no doubt among those “comprehensive liberals” Greene has in mind who suffer from insufficient humility or modesty about the principles and values that we believe government may and should promote. I will focus on children, a group that receives little attention in Greene’s book, and ask about the consequences for them of his agnosticism and his argument “against obligation” and in favor of fracturing and dividing power.

This Article proceeds as follows. Part I identifies some points on which Greene and I agree with respect to the idea of multiple sources of sovereignty in our constitutional order and what government may do to foster virtue and *e pluribus unum*. Part II turns to some points on which we disagree. I also identify some issues as to which it is not possible to determine agreement or disagreement without further information. Part III focuses on children and on the possible consequences for them of Greene’s arguments “against obligation” and in favor of fracturing and dividing power. Children, as Greene acknowledges, pose challenges for any argument that, like his, rests a robust right to exit on a baseline of “knowing and voluntary choices (by adults).”<sup>11</sup>

---

<sup>6</sup> GREENE, *supra* note 1, at 158.

<sup>7</sup> *Id.* at 115.

<sup>8</sup> *Id.* at 114.

<sup>9</sup> *Id.* at 157.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 157-58.

Moreover, as he and I agree, our constitutional order divides authority over children between government and parents (and other guardians).<sup>12</sup> In addition, the Supreme Court has recognized that children also possess constitutional rights of their own.<sup>13</sup> I consider the specific examples Greene provides of how his theory would apply to children. I also pose questions about how his theory might apply to a situation his book does not address: the ways institutions respond to child sexual abuse and to their obligations under mandatory reporting laws.

Most of this Article addresses chapter two of *Against Obligation*, Greene's lengthy discussion of "Accommodating Our Plural Obligations."<sup>14</sup> I do not assess the persuasiveness of his jurisprudential argument that we have no general obligation to obey the law or of his claims about constitutional interpretation. As my title suggests, however, I do resist his agnosticism about "the right" or "the just" – and not only "the good" – and his conception of the state as simply one among many sources of authority, with no special weight or claim to our allegiance. I engage with Greene's intricate arguments "against political obligation"<sup>15</sup> only indirectly as they bear on the issues of accommodating pluralism, the status of children in a system of fractured authority, and robust rights to opt out and live in one's own nomic community.

## I. SOME POINTS OF AGREEMENT

### A. *Our Constitutional Order Assumes Multiple Sites of Sovereignty*

Over the years, I have profited from talking with Abner Greene about various dilemmas posed by pluralism, governmental speech, and a constitutional order premised on, as he aptly calls it, "multiple sources of authority." Indeed, his work has become a standard reference for me when discussing the tensions within our constitutional order over the relationship between government and institutions of civil society, in particular whether the latter, as seedbeds of civic virtue, are congruent with and undergird the political order or instead function as distinct sources of norms and values and as buffers against state power.<sup>16</sup> In discussing the dual authority of government and parents over the education of children as an instantiation of this tension and of the possible conflict between political and personal virtues and values, I have previously observed: "The possibility of this conflict invites the question of how much pluralism a healthy constitutional democracy can sustain in a system in which there coexist multiple sites of sovereignty and the ideal of

---

<sup>12</sup> See *id.* at 158.

<sup>13</sup> See *infra* notes 126-27 and accompanying text.

<sup>14</sup> See GREENE, *supra* note 1, at 114-60.

<sup>15</sup> *Id.* at 35.

<sup>16</sup> See, e.g., JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 92, 302 n.69 (2013); LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 81-82 & n.168 (2006).

unity amidst diversity.”<sup>17</sup> Greene tends to focus more on “centrifugal” forces, that is, on how the norms of civil society take citizens away from the state and its “centripetal” forces.<sup>18</sup> I tend to focus on the tension between these two forces. Greene sees a strong “antifoundationalism” inherent in the constitutional order, while I see the unresolved tension between a “liberal expectancy” of congruence (along with a “liberal anxiety” over a lack of congruence) and a commitment to pluralism that views constitutional democracy as sustainable even if nongovernmental groups are illiberal and foster antidemocratic values.<sup>19</sup> Both of us have concerns about the ideal of *e pluribus unum*. Greene believes this ideal is consistent with robust rights of exit and groups living apart from state norms.<sup>20</sup> I am concerned about whether this vision robs the category of citizen of any real meaning.

B. *Government May Use Persuasion to Express Its Views – and to Cultivate Values and Virtues*

Greene and I agree that government may use methods short of coercion to persuade about public or political values and constitutional principles.<sup>21</sup> In previous work, and most recently with James Fleming in *Ordered Liberty: Rights, Responsibilities, and Virtues*, I have spoken about this as government having the authority to engage in a formative project to promote good and responsible citizenship.<sup>22</sup> This formative project may promote public values and constitutional principles such as racial equality, gender equality, tolerance, and even respect for diversity.<sup>23</sup> Greene has written extensively on government speech as well as on government’s selective use of funding to promote its ends.<sup>24</sup> Although I do not agree with everything he says on these topics, I do

<sup>17</sup> Linda C. McClain, *Religious and Political Virtues and Values in Congruence or Conflict?: On Smith, Bob Jones University, and Christian Legal Society*, 32 CARDOZO L. REV. 1959, 1961 (2011) (footnote omitted).

<sup>18</sup> GREENE, *supra* note 1, at 68, 188.

<sup>19</sup> See FLEMING & MCCLAIN, *supra* note 16, at 83, 90-91 (citing NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* (2000)); McClain, *supra* note 17, at 1959-61.

<sup>20</sup> See GREENE, *supra* note 1, at 50, 117.

<sup>21</sup> *Id.* at 253.

<sup>22</sup> See generally Linda C. McClain, *Autonomy, Toleration, and Governmental Promotion of Good Lives: Beyond “Empty” Toleration to Toleration as Respect*, 59 OHIO ST. L.J. 19 (1998) [hereinafter McClain, *Autonomy*]; Linda C. McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 CORNELL L. REV. 1221 (2000) [hereinafter McClain, *Toward a Formative Project*]. For additional discussion, see also FLEMING & MCCLAIN, *supra* note 16, at 1-4, 112-18, 244-61, and MCCLAIN, *supra* note 16, at 15-49. On the idea of a formative project, see MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 270-73, 282-83 (1996).

<sup>23</sup> MCCLAIN, *supra* note 16, at 1-4, 112-14.

<sup>24</sup> See, e.g., Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1 (2000) (discussing whether government should use its powers of persuasion to promote any one

agree that speech and funding are two tools government may use to promote its ends.

While we share the conviction that government may advance its own views, Greene seems to have a weaker commitment to what I call a formative project and to regard it as less of an imperative. One explanation for this difference may be his central concern with helping people escape the clutches of the state – and its laws – rather than be grasped by it. Thus, in resisting the labeling of his argument as one for “anarchy,” he writes: “[M]y argument doesn’t exalt the centrifugal; government may play a role through its speech and funding in seeking *and perhaps achieving* a more harmonious republic, integrated in many ways and coalescing around common values.”<sup>25</sup> Greene’s phrasing seems to downplay the importance of governmental attempts at promoting a more harmonious republic, a stance consistent with his view of government as just one repository of the people’s power in competition for citizens’ allegiance.<sup>26</sup> By contrast, I believe that the status of citizen and the idea of free and equal citizenship – and the norms attendant to being a citizen – are weighty and not simply one contender in the marketplace for the people’s allegiance.

In addition to using its persuasive power, government, I have argued, may also use tools like antidiscrimination laws to promote free and equal citizenship.<sup>27</sup> These laws are not only persuasive in expressing ideals, but also harness the state’s coercive power by prohibiting and commanding certain conduct from people and institutions. This, of course, raises the question of the permissible scope of exemption from such laws when the norms these laws embody clash with the norms of what Greene calls “nomic communities” or “nomic groups.”<sup>28</sup>

---

view of what is “good” over another); Abner S. Greene, *Speech Platforms*, 61 CASE W. RES. L. REV. 1253 (2011) (discussing the state’s authority to create “platforms” for private speech and whether it may advance its own values through selective exclusion from these platforms).

<sup>25</sup> GREENE, *supra* note 1, at 253 (emphasis added).

<sup>26</sup> *Id.* at 4.

<sup>27</sup> See FLEMING & MCCLAIN, *supra* note 16, at 146-57; McClain, *Autonomy*, *supra* note 22, at 110-13; McClain, *Toward a Formative Project*, *supra* note 22, at 1242-49.

<sup>28</sup> See GREENE, *supra* note 1, at 55 (“[Robert] Cover forcefully makes the case for a broad principle of associational freedom based not on the negative, or checking, value of dissident communities, but rather on the affirmative virtues of living according to law made locally, by a group that constructs itself as an insular, norm-making community.”); Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 4, 10 (1996) (“[T]he American constitutional order is best understood as adopting a version of ‘permeable sovereignty’ that allows homogeneous nomic communities to exercise public as well as private power, provided that the communities exercise public power in a constitutional fashion.”).



C. *Religion in the Public Square? Yes and No*

Greene and I agree that neither citizens nor lawmakers must shed their religious convictions in the public square.<sup>29</sup> We also agree that laws should not be enacted for the purpose of advancing religious norms.<sup>30</sup> As to the first point: critics charge that liberals insist on a “naked public square” where people are not allowed to appeal to their deepest moral and religious convictions.<sup>31</sup> This is not an apt characterization of either political liberalism or of the constitutional liberalism that James Fleming and I endorse.<sup>32</sup> Instead, such forms of liberalism maintain that citizens may appeal to their religious convictions and other comprehensive views, but should also attempt to explain how those religious convictions support political values in terms and arguments that are accessible to nonbelievers – those who do not share the comprehensive worldview of the religious person.<sup>33</sup>

This challenge of accessibility relates to the second point. Greene explains well why laws should not be expressly grounded in religious convictions:

Although (some) secular as well as religious beliefs may not be provable, there is nonetheless a difference between expressly grounding law in premises accessible to citizens as citizens, on the one hand, and only to those with a particular religious faith, on the other hand. When religious believers enact laws for the express purpose of advancing norms dictated by their religion, they exclude nonbelievers from meaningful participation in political discourse and from meaningful access to the source of normative authority predicating law. They force their reference out on others, disempowering nonbelievers. For this reason, it is proper to insist that law be grounded expressly in sources of normative authority accessible to citizens as citizens, not merely to those who share faith in a separate, extrahuman source of normative authority.<sup>34</sup>

One example of offering an impermissible basis for a law is the statement made by New York State Senator Reuben Diaz in opposing New York’s proposed marriage equality law: “[W]e are trying to redefine marriage. . . . I agree with Archbishop Timothy Dolan when he said that God, not Albany, has settled the definition of marriage a long time ago.”<sup>35</sup> In other words, Senator

---

<sup>29</sup> See GREENE, *supra* note 1, at 139, 150-51.

<sup>30</sup> *Id.* at 150-51.

<sup>31</sup> See, e.g., MICHAEL J. SANDEL, JUSTICE: WHAT’S THE RIGHT THING TO DO? 248-51 (2009).

<sup>32</sup> See FLEMING & MCCLAIN, *supra* note 16, at 183-206.

<sup>33</sup> GREENE, *supra* note 1, at 150-51. For liberal arguments along these lines, see John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 783-86 (1997) (explaining “the proviso”). See also AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 13-15 (1996) (explaining the requirement of “reciprocity” as among the criteria for “substantive moral argument” in politics).

<sup>34</sup> GREENE, *supra* note 1, at 150-51.

<sup>35</sup> Sen. Ruben Diaz, Remarks on the Floor of the New York Senate (June 24, 2011)

Diaz believes the New York legislature may not enact a definition of marriage that conflicts with religious teaching about marriage. It would be interesting to see how Greene would evaluate Reverend Billy Graham's "vote biblical values" campaign, in which he urged voters to "cast our ballots for candidates who base their decisions on biblical principles" in a series of full-page newspaper ads shortly before the 2012 presidential election.<sup>36</sup> Greene does not bar lawmakers from voting based on their religious convictions. In fact, he has "no quarrel with legislators' or citizens' relying on their religious beliefs when they form political positions or decide how to vote (for laws or representatives)."<sup>37</sup> For Greene, the real problem arises when legislators enact laws primarily to give effect to their religious convictions, resulting in laws that "appear[] to have been passed because of a sectarian religious concern."<sup>38</sup>

Thus, I am assuming that a law designed primarily to, as Graham puts it, "support the biblical definition of marriage between a man and a woman"<sup>39</sup> would violate Greene's requirement that nonbelievers not be excluded from "meaningful participation in political discourse" or from "meaningful access to the source of normative authority predicated law."<sup>40</sup> The Defense of Marriage Act (DOMA) is a good test case for Greene's requirement that a law not exclude nonbelievers.<sup>41</sup> At the core of the recent DOMA litigation were Congress's purposes in enacting the law and whether some of them, such as expressing moral disapproval of homosexuality and promoting traditional Judeo-Christian moral teaching about marriage, would survive constitutional scrutiny.<sup>42</sup>

---

(transcript available at <http://m.nysenate.gov/legislation/transcript/regular-session-06-24-2011>). For a discussion of these remarks, see FLEMING & MCCLAIN, *supra* note 16, at 200.

<sup>36</sup> One such advertisement appeared in the print edition of the *Wall Street Journal* on October 18, 2012. See Robert Kessler, *Billy Graham Bought a Whole Page in the Wall Street Journal to Tell You What He Thinks About Gays and Women*, GAWKER (Oct. 18, 2012, 12:25 PM), <http://gawker.com/5952856/billy-graham-bought-a-whole-page-in-the-wall-street-journal-to-tell-you-what-he-thinks-about-gays-and-women> [hereinafter Graham Advertisement] (including a reproduction of the advertisement).

<sup>37</sup> GREENE, *supra* note 1, at 151.

<sup>38</sup> *Id.*

<sup>39</sup> Graham Advertisement, *supra* note 36.

<sup>40</sup> GREENE, *supra* note 1, at 151.

<sup>41</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)).

<sup>42</sup> See, e.g., *Windsor v. United States*, No. 12-307, slip op. at 20-21 (U.S. June 26, 2013) (holding that Section 3 of DOMA violates "basic due process and equal protection principles" and citing language in House Report 3936 about DOMA's stated purposes of expressing "moral disapproval of homosexuality" and defending "traditional heterosexual marriage" as evidence that DOMA's "essence" was "interference with the equal dignity of same-sex marriages").

In addition to advocating for “the biblical definition of marriage,” Graham’s ad urges voters to choose candidates “who protect the sanctity of life.”<sup>43</sup> This dovetails well with another of Greene’s points, namely the extent to which “biblical principles” of “sanctity” should justify a law barring abortion.<sup>44</sup> According to Greene, “it is problematic under the Establishment Clause for adherents to a religious faith to forbid abortions if the predominant, express reason is a belief that God condemns abortion.”<sup>45</sup> Greene argues that laws must “have an express secular purpose rather than merely a plausible one.”<sup>46</sup> If laws are premised on “an intertwined set of purposes, some religious and some secular,” this is “inevitable” and not a sufficient basis to invalidate a law, unless laws are predominantly based on religious justifications.<sup>47</sup> Constitutional precedents on the Establishment Clause support his argument.<sup>48</sup>

Greene explains this constraint on “legislation based in express, predominant religious justification” – pursuant to the Establishment Clause – as one half of the “political balance” of the religion clauses.<sup>49</sup> This half he calls the “gag rule” – the idea that religious people are limited in how they may participate in the political process.<sup>50</sup>

The other half of the balance is the Free Exercise Clause.<sup>51</sup> Here, Greene and I share some points of agreement but also diverge in our views of how frequent and robust exemptions should be. Greene argues:

[W]e should see exemptions as required to compensate religious people for the obstacle this disability poses to their participation in the democratic process. Thus, the Free Exercise Clause can be seen as providing a political counterweight to the Establishment Clause. If the latter should be read to prevent religious faith from being the predominant, express justification for law, then the former should be construed to make religious faith a ground for avoiding the obligations of law.<sup>52</sup>

This political balance argument seems to be a variant of the idea that autonomy means self-rule: we – as citizens of a constitutional democracy – live according to rules we give ourselves. Conversely, if religious people, due

---

<sup>43</sup> Graham Advertisement, *supra* note 36.

<sup>44</sup> GREENE, *supra* note 1, at 151.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 152.

<sup>47</sup> *Id.*

<sup>48</sup> See, e.g., *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005) (“When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.”).

<sup>49</sup> GREENE, *supra* note 1, at 151, 155.

<sup>50</sup> *Id.* at 155.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

to a gag rule, are not able to give themselves the laws by which the government expects them to live, then they should be able, as Greene puts it, to avoid the obligations of that law. This seems, however, to be a wholesale retreat from what political liberalism calls the possibility of an overlapping consensus – that people of differing comprehensive views can reach an overlapping consensus on principles of justice.<sup>53</sup> Instead, Greene's system seems to be one in which the religious, in exchange for not imposing their beliefs on nonbelievers or on members of other religious groups by law, may opt out of political obligation. This provides a useful transition point to Part II, in which I elaborate on points on which Greene and I disagree or on which more information is needed.

## II. POINTS OF DISAGREEMENT OR UNCERTAINTY

My points of disagreement stem, in significant part, from Greene's agnosticism about not only "the good" but also "the right." This contributes to his plea for humility or modesty about the proper scope of governmental authority and for a robust accommodation of those who seek to escape the "clutches" of the state.<sup>54</sup> I will argue "against agnosticism" with respect to the importance of inculcating civic virtues and supporting political values notwithstanding pluralism. I will question whether the U.S. constitutional order is really as antifoundationalist as Greene posits. This in turn relates to my objection that government is not merely one among the many, but should have special weight in terms of the demands it makes upon us – and the responsibilities it has to us – as citizens.

### A. *Agnosticism as Part of Our Constitutional Order?*

In *Against Obligation* Greene argues that "recognizing sovereignty as permeable rather than plenary fits with the agnosticism of value that helps explain much of our constitutional order."<sup>55</sup> He interprets that order as antifoundationalist because "it insists the repositories of the people's power be multiple, regarding both structure (powers) and rights."<sup>56</sup> He makes the intriguing argument that "[d]oubt as to what's right is written all over our constitutional text and history."<sup>57</sup> In support, he refers not only to the division of power between nation and states (federalism) and the institution of judicial review (antimajoritarianism), but also to a host of other constitutional features, including "the prohibition on establishment of religion," "a strongly enforced set of political rights," "recognition of the free exercise of religion[,] and

---

<sup>53</sup> See JOHN RAWLS, *POLITICAL LIBERALISM* 133-72 (1993).

<sup>54</sup> See GREENE, *supra* note 1, at 114-15.

<sup>55</sup> *Id.* at 23.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

freedom of both expressive and intimate association.”<sup>58</sup> He further states: “Viewing the people’s sources of normative authority as permeable, as including both the state’s laws and sources other than the state, fits snugly with this anti-foundationalist, multiple repositories of power picture.”<sup>59</sup>

Greene stresses that “much of [his] argument against political and interpretive obligation is based in keeping front and center agnosticism of value.”<sup>60</sup> Arguments for political obligation that “seek to overcome disagreement as to the good and the just by seeking common ground and settlement,” he contends, “do not properly account for sources of normative authority as plural.”<sup>61</sup> They seek, he continues, a “false solace” from “overcoming difference,” even though difference is “something we can’t get past.”<sup>62</sup> “Doubt about our premises” animates Greene’s proposed balancing approach to accommodating minority practices “to the extent possible.”<sup>63</sup>

A common liberal strategy – particularly in political liberalism – is to distinguish between agreement about “the good,” that is, on the best way to live, and to say it is possible to reach agreement on “the right,” that is, principles of political justice, even while disagreeing over “the good.”<sup>64</sup> Greene extends his agnosticism to the right as well: a baseline guiding his approach to accommodation of religion is “doubt [about] whether we (even comprehensive liberals) have reached the truest or best answers regarding the just or the good.”<sup>65</sup> Recall that the state “must compete with other sources of normative authority,”<sup>66</sup> and public norms, one infers, deserve no more allegiance than any other kind of norms.

Thus, I believe that I differ with Greene in terms of the weight of public norms. At several points in the book, however, he declines to take a stand on certain matters, which makes it hard to be sure about the exact scope of our disagreement. For example, he takes no stand on whether or not “value pluralism” is true; it is sufficient that there is “political pluralism.”<sup>67</sup> He takes no stand on “obligations to nonstate sources” – that is, obligations people owe to the other nomic communities to which they belong.<sup>68</sup> Greene states that he does not agree with all the claims made in the scholarly literature about pluralism and multiculturalism. It is sufficient that his own view that “the state

---

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 121.

<sup>64</sup> The political liberalism of John Rawls employs this distinction. *See generally* RAWLS, *supra* note 53, at 173-211.

<sup>65</sup> GREENE, *supra* note 1, at 157.

<sup>66</sup> *Id.* at 21.

<sup>67</sup> *Id.* at 22.

<sup>68</sup> *Id.* at 20.

must compete with other sources of normative authority” is “consistent” with “much” of that literature.<sup>69</sup> As an example, he quotes Harold Laski’s “pluralistic conception of society,” within which “the state is only one among many forms of human association.”<sup>70</sup> The state, Laski elaborates, “is not necessarily any more in harmony with the end of society than a church or a trade-union, or a freemasons’ lodge. They have . . . relations which the state controls; but that does not make them inferior to the state.”<sup>71</sup>

Pertinent to the discussion of where children feature in his pluralistic vision, Greene is “agnostic” as to “whether the state should ensure that all children receive at least some education out from under the control of their parents.”<sup>72</sup> Elsewhere, he has argued that his theory of multiple repositories of power would justify banning private schooling lest parents have a monopoly on their children’s education.<sup>73</sup>

B. *How Does the Double Balancing Process Work?*

The political balance of the religion clauses, Greene contends, is that the protection of the Free Exercise Clause, which includes religious accommodations from the law, compensates for the constraints of the Establishment Clause.<sup>74</sup> It is hard to gauge where I disagree with Greene because his primary point is to make the case for generous accommodation, not to work out all the details of when to grant such accommodations. He mentions the use of a balancing test.<sup>75</sup> At the outset of chapter two, “Accommodating Our Plural Obligations,” he argues that we should “seek a nuanced approach to relaxing the demands of the state, to allowing religious and philosophical and other sources of normative authority to govern the lives of the state’s subjects to the fullest extent compatible with the stable operation of government and the liberty of other persons.”<sup>76</sup> He quickly admits that “[h]ow we accommodate exit with stability and the liberty of others is a difficult task,” but not one we should scrap.<sup>77</sup>

What is Greene’s method? He proposes a balancing approach, or, in effect, a multifactor approach. When, for example, is uniformity necessary and when is the “liberty of others . . . affected significantly enough to override a claim of

---

<sup>69</sup> *Id.* at 21.

<sup>70</sup> *Id.* (quoting HAROLD J. LASKI, *AUTHORITY IN THE MODERN STATE* 26 (1919)).

<sup>71</sup> *Id.* (alteration in original) (quoting LASKI, *supra* note 70, at 65).

<sup>72</sup> *Id.* at 158.

<sup>73</sup> See Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 CHI.-KENT L. REV. 477, 489-92 (2000) [hereinafter Greene, *Civil Society*]; Abner S. Greene, *Why Vouchers Are Unconstitutional and Why They’re Not*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 397, 408 (1999) [hereinafter Greene, *Vouchers*].

<sup>74</sup> See GREENE, *supra* note 1, at 149-57.

<sup>75</sup> *Id.* at 115.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

exemption”?<sup>78</sup> It is striking that Greene does not mention the equality of others as being a reason to override a claim of exemption. A common objection by religious and other private associations to antidiscrimination laws, enacted to further free and equal citizenship and equality of opportunity, is that those laws pursue equality at the expense of religious liberty.<sup>79</sup>

While discussing “The Problem of Illiberal Groups,”<sup>80</sup> Greene briefly mentions that some exemptions “would raise equality concerns; often (though not exclusively) these involve matters of gender, of what comprehensive liberals would consider indefensibly unequal treatment of women and girls.”<sup>81</sup> The use of “comprehensive” liberals here is jarring, as if sex equality and women’s equal citizenship (including formal equality or equal treatment in law) were not prominent *constitutional* principles, at least since the 1970s, and important political values.<sup>82</sup> Or as if contemporary family law did not reflect a gender revolution away from a hierarchical model of husband and wife and toward gender neutrality and a premise that marriage is an equal partnership.<sup>83</sup> Or as if federal civil rights laws, such as Title VII<sup>84</sup> and Title IX,<sup>85</sup> did not reflect the convictions that male and female children should have equal opportunities in education and adult males and females should have equal opportunity in education and the workplace.

How is the “unequal treatment of women and girls” simply objectionable to “comprehensive liberals”?<sup>86</sup> Of course, it all depends upon what treatment Greene means. From what laws do these groups seek exemptions? For what unequal practices do they seek protection? He tells us that at one end of the spectrum of practices are those to which we should not defer; thus, “we shouldn’t accept a group’s view that husbands should be permitted to beat their wives or children, for any reason.”<sup>87</sup> Conversely, at the other end, we should defer to an association’s rules about leadership (presumably, being open only

---

<sup>78</sup> *Id.* at 124.

<sup>79</sup> See FLEMING & MCCLAIN, *supra* note 16, at 146-76.

<sup>80</sup> GREENE, *supra* note 1, at 157.

<sup>81</sup> *Id.*

<sup>82</sup> See *United States v. Virginia*, 518 U.S. 515, 532 (1996) (“Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature – equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.” (citing *Reed v. Reed*, 404 U.S. 71 (1971))); MCCLAIN, *supra* note 16, at 60-61.

<sup>83</sup> MCCLAIN, *supra* note 16, at 56-61; Susan Frelich Appleton, *Gender and Parentage: Family Law’s Equality Project in Our Empirical Age*, in *WHAT IS PARENTHOOD? CONTEMPORARY DEBATES ABOUT THE FAMILY* 237, 237-40 (Linda C. McClain & Daniel Cere eds., 2013).

<sup>84</sup> 42 U.S.C. § 2000e-2 (2006).

<sup>85</sup> 20 U.S.C. §§ 1681-1688 (2006).

<sup>86</sup> GREENE, *supra* note 1, at 157.

<sup>87</sup> *Id.* at 158.

to men) and provide them opt outs “from antidiscrimination laws.”<sup>88</sup> According to Greene, “Harder cases will fall in between.”<sup>89</sup>

One baseline Greene uses in addressing deference to illiberal persons or groups is “knowing and voluntary choices (by adults) to adhere to various sources of normative authority (or perhaps to do so from felt obligation).”<sup>90</sup> As he recognizes, there are lots of tough questions about “what counts as knowing and voluntary choice by adults to enter and remain within a group.”<sup>91</sup> Greene does not fill in many blanks about those “in-between,” harder cases. Part III addresses an even tougher problem – the place of children, for whom a premise of knowing and voluntary choice simply cannot apply.

How would Greene resolve cases where the equality rights of persons *not* within the religious group are in evident conflict with the free exercise of the religious group and its members? How would he analyze the many conflicts arising today from alleged threats to religious liberty posed by state laws allowing same-sex couples to marry? Tantalizingly, his book opens by asking the reader, on page one, to “suppose you’re a government official” who is “uncertain whether it’s constitutional to deny a same-sex couple a marriage license.”<sup>92</sup> Well, suppose the law of your state now says you must issue that couple a license, but your religious faith tells you that marriage is only between one man and one woman. This is exactly the situation of a town clerk in upstate New York, who has argued that she should be able to hold fast to her religious convictions and to her job, diverting same-sex couples to her deputy clerk, who works on a different day.<sup>93</sup> She does not seek to flee the public realm and live only in her nomic community. Instead, she wants to have religion in the public square to the extent that she can live “free from the clutches of the state” while being a governmental official – a public employee.<sup>94</sup> What does Greene think about that case?

In my view, the town clerk should not be exempted as a matter of any constitutional right to free exercise. Nor should she have any general entitlement to accommodation by her employer. That said, may her public employer, nonetheless, attempt to accommodate her? Robin Wilson makes a plausible case for “easy” accommodation when staffing permits it, to the extent that same-sex couples are not burdened by the accommodation or forced to confront a clerk that refuses to issue them a license.<sup>95</sup> In the New York case,

---

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 157.

<sup>91</sup> *Id.* at 158.

<sup>92</sup> *Id.* at 1.

<sup>93</sup> Thomas Kaplan, *Rights Collide as Town Clerk Sidesteps Role in Gay Marriages*, N.Y. TIMES, Sept. 28, 2011, at A1.

<sup>94</sup> GREENE, *supra* note 1, at 115.

<sup>95</sup> See Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL’Y 318, 336, 340,



however, accommodation would place a direct burden on same-sex couples and treat them in an unequal manner that belies the statutory aims of the Marriage Equality Act: the head clerk, with state sanction, could deny same-sex couples a license and require that they come back and see her deputy clerk on a different day. In practical effect, this means that unlike opposite-sex couples, who could get a license at any time during normal business hours, same-sex couples could only get one at limited times.

The example of the town clerk returns us to the issue of religion in the public square. This public official is not entitled to have the marriage laws of New York embody her religious convictions about marriage. Thus, when the New York legislature enacted the Marriage Equality Act, it drew a sharp distinction between civil and religious marriage. The legislature's action explains why government has an interest in the institution of marriage, as a civil matter, and how the New York law, with its robust religious exemptions, recognizes that religion and religious marriage have their own proper, independent spheres.<sup>96</sup> This is consistent with the Establishment Clause part of the political balance struck by the religion clauses. The clerk, however, does not want to enforce a state law that does not mirror her religious convictions about marriage. Is her "compensation," pursuant to the Free Exercise Clause, to be that she may opt out of issuing marriage licenses? Elsewhere in his book, Greene argues in favor of religious communities living separately, according to their norms, and possessing "certain attributes of state power," subject to constitutional constraints.<sup>97</sup> What about a public official seeking to abide by private norms in her public capacity in a way that affects the civil rights of New York citizens? Should we be agnostic not only about whether marriage equality is "good," but also about whether it is "right," and thus exempt her?<sup>98</sup> Or should we side with Governor Cuomo in his instructions to clerks that they must follow the law and issue marriage licenses or else find another job?<sup>99</sup>

---

359 n.258 (2010).

<sup>96</sup> The Statement in Support of the Marriage Equality Act explains: "[T]his bill grants equal access to the government-created legal institution of civil marriage, while leaving the religious institution of marriage to its own separate, and fully autonomous, sphere." 2011 N.Y. Sess. Laws 1732, 1734 (McKinney). For further discussion, see FLEMING & MCCLAIN, *supra* note 16, at 174, 204-05.

<sup>97</sup> GREENE, *supra* note 1, at 146-48.

<sup>98</sup> I will spare Greene the same question about clerical defiance of interracial marriage, but I should note that, in the 1960s, some people opposed interracial marriage on religious grounds and denominations themselves struggled over whether to come out against antimiscegenation laws. See FLEMING & MCCLAIN, *supra* note 16, at 172-73.

<sup>99</sup> See Kaplan, *supra* note 93 (quoting Governor Cuomo as saying, "When you enforce the laws of the state, you don't get to pick and choose"); see also Memorandum from the Office of Vital Records to the N.Y. State Town & City Clerks (July 13, 2011), available at [http://site.pfaw.org/pdf/Jordan\\_Belforti\\_NY\\_Marriage.PDF](http://site.pfaw.org/pdf/Jordan_Belforti_NY_Marriage.PDF) ("No application for a marriage license shall be denied on the ground that the parties are of the same or a different sex."). For further discussion, see FLEMING & MCCLAIN, *supra* note 16, at 174-75.

Based on my conversations with – and analysis of the writings by – some religious conservatives who oppose civil laws allowing same-sex couples to marry, I have concluded that no set of religious exemptions would satisfy them. The marriage equality law itself is an affront to these religious citizens. Moreover, religious conservatives argue that even exemptions for religious institutions and clergy will not help the ordinary citizen engaged in commerce who objects to same-sex marriage and does not want to facilitate these marriages in any way, even by booking same-sex couples a honeymoon flight at a tourist agency. Religious objectors to marriage equality have made it clear that they want to win at the level of state law itself. Their view of pluralism is to let different religions allow same-sex couples to enter into commitment ceremonies, or even “marriages,” as understood in those religious traditions, but let civil law reflect *their* conception of marriage.<sup>100</sup> Marriage, they say, is a “natural institution that predates government”; it is based on “biological” and “anthropological” truth about the sexes and understood as such in religious traditions.<sup>101</sup> If, however, the state is going to define marriage, *then* it must embrace a “true” understanding of marriage and recognize only “true marriages” – that is, the vision of gender-complementary and conjugal marriage promulgated by the trio of Robert George, Sherif Girgis, and Ryan Anderson in a much-circulated law review article, new book, and, most recently, amicus briefs in the Proposition 8 and DOMA cases before the Supreme Court last term.<sup>102</sup>

It would be helpful to know how Greene’s framework would address these issues. Prominent religious officials and groups, in various declarations,<sup>103</sup> ad

---

<sup>100</sup> I base this upon remarks made by Witherspoon Institute leader Matthew Franck at a panel about marriage in which we participated on May 4, 2012, at Princeton University, as well as his various writings on marriage. For a recent example of Franck’s contention that religious exemptions to marriage equality laws have failed to protect religious liberty, see Matthew J. Franck, *Same-Sex Marriage and Religious Freedom, Fundamentally at Odds*, WITHERSPOON INST. (June 18, 2013), <http://www.thepublicdiscourse.com/2013/06/10393>.

<sup>101</sup> See Ryan T. Anderson, *Marriage: What It Is, Why It Matters, and the Consequences of Redefining It*, HERITAGE FOUND. 1, 3 (Mar. 11, 2013), [http://s3.amazonaws.com/thf\\_media/2013/pdf/bg2775.pdf](http://s3.amazonaws.com/thf_media/2013/pdf/bg2775.pdf).

<sup>102</sup> See *United States v. Windsor*, No. 12-307, slip op. at 13-14 (U.S. June 26, 2013) (Alito, J., dissenting) (citing SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* (2012), as illustrative of the “‘traditional’ or ‘conjugal’ view” of marriage); Brief for Robert P. George, Sherif Girgis & Ryan T. Anderson as Amici Curiae Supporting Petitioners, *Hollingsworth v. Perry*, No. 12-144, slip op. (U.S. June 26, 2013); Brief for Robert P. George, Sherif Girgis & Ryan T. Anderson as Amici Curiae Supporting Respondents, *United States v. Windsor*, No. 12-307, slip op. (U.S. June 26, 2013); GIRGIS, ANDERSON & GEORGE, *supra*; SHERIF Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245 (2011)..

<sup>103</sup> See Robert George, Timothy George & Chuck Colson, *The Manhattan Declaration: A Call to Christian Conscience*, MANHATTAN DECLARATION (Nov. 20, 2009), <http://www.m>

hoc committees,<sup>104</sup> and task force reports,<sup>105</sup> identify civil law's opening up of marriage to same-sex couples as one of the most visible arenas in which religious liberty is under siege. In addition, they identify other clashes between society's evolving protection of the rights of gay men and lesbians and the free exercise claims of religious groups, such as whether to exempt social service organizations from placing foster or adoptive children with homosexual single parents or same-sex couples. Massachusetts's failure to accommodate Catholic Charities of Boston, causing the organization to exit the adoption business, is used as a prominent example in many warnings by religious groups.<sup>106</sup> Another cluster of issues involves health care, contraception, and abortion. How would these be resolved under Greene's balancing test or multi-factor approach?

### III. CHILDREN

Where do children and their rights, needs, and interests feature in Greene's argument "against obligation" and in favor of "multiple sources of authority"? In his brief section in chapter two on "The Problem of Illiberal Groups," Greene notes that some exemptions will "raise equality concerns," for example, "what comprehensive liberals would consider indefensibly unequal treatment of women and girls."<sup>107</sup> He also notes that his baseline of "knowing and voluntary choices (by adults) to adhere to various sources of normative authority" does not readily apply to children.<sup>108</sup> Nonetheless, many concrete clashes between state (and federal) laws and claims of religion involve children. Children also participate in – and are entrusted by their parents to – many institutions with their own norms and forms of governance. I will first sketch the place of children in the U.S. constitutional system of divided authority, highlighting their status as both rights-holders and vulnerable persons. I will then consider the brief attention Greene does give to children in his book and raise concerns about how children would fare in Greene's framework, discussing an issue he does not: the sexual abuse of children in

---

[anhattanddeclaration.org/man\\_dec\\_resources/Manhattan\\_Declaration\\_full\\_text.pdf](http://anhattanddeclaration.org/man_dec_resources/Manhattan_Declaration_full_text.pdf) [hereinafter *Manhattan Declaration*].

<sup>104</sup> See Archbishop William E. Lori, Address at the U.S. Conference of Catholic Bishops General Assembly: Address on Religious Liberty (Nov. 14, 2011) (transcript available at <http://www.usccb.org/about/leadership/usccb-general-assembly/2011-november-meeting/archbishop-lori-religious-liberty-november-2011-address.cfm>). Archbishop Lori is the head of the recently formed U.S. Conference of Catholic Bishops Ad Hoc Committee for Religious Liberty. *Biography of Bishop William E. Lori, S.T.D.*, DIOCESE OF BRIDGEPORT, <http://www.bridgeportdiocese.com/index.php/ourbishop> (last visited June 10, 2013).

<sup>105</sup> See TIMOTHY SAMUEL SHAH ET AL., RELIGIOUS FREEDOM: WHY NOW? DEFENDING AN EMBATTLED HUMAN RIGHT (2012).

<sup>106</sup> See *id.*, *supra* note 105, at 79-80; *Manhattan Declaration*, *supra* note 103.

<sup>107</sup> GREENE, *supra* note 1, at 157.

<sup>108</sup> *Id.*

institutions and the efforts of the state, through mandatory reporting laws, to protect children from such abuse.

A. *Fractured Authority and the Place of Children*

Our constitutional order divides authority over children between their parents – who have a fundamental liberty to direct their care, education, and custody – and government, which has an interest, as *parens patriae*, in the healthy development of children, including protecting them from harms and ensuring their chance to develop into persons capable of participating in democratic self-government. *Meyer v. Nebraska*,<sup>109</sup> *Pierce v. Society of Sisters*,<sup>110</sup> and *Prince v. Massachusetts*<sup>111</sup> make up the canonical trio on parental liberty. In *Troxel v. Granville*<sup>112</sup> the Supreme Court invoked this trio when it affirmed such liberty: “The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court.”<sup>113</sup> *Prince* does not merely address parental liberty, but also asserts that the state has a compelling interest in children’s healthy development.<sup>114</sup> Moreover, *Prince* includes the oft-quoted directive: “Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”<sup>115</sup>

A vivid expression of the state’s interest in the healthy development of children appears in a dissenting opinion by Justice Rehnquist (joined by Justices White and O’Connor) in *Santosky v. Kramer*.<sup>116</sup> In *Santosky* the Court held that parental rights could not be terminated without satisfying a clear and convincing evidence standard.<sup>117</sup> Explaining that the majority erred in imposing such a high standard, Rehnquist quotes freely from *Prince* to emphasize the strength of the State’s interests:

In addition to the child’s interest in a normal homelife, “the State has an urgent interest in the welfare of the child.” Few could doubt that the most valuable resource of a self-governing society is its population of children who will one day become adults and themselves assume the responsibility of self-governance. “A democratic society rests, for its continuance, upon

<sup>109</sup> 262 U.S. 390 (1923).

<sup>110</sup> 268 U.S. 510 (1925).

<sup>111</sup> 321 U.S. 158, 170 (1944) (ruling against the parental liberty claim).

<sup>112</sup> 530 U.S. 57 (2000).

<sup>113</sup> *Id.* at 65.

<sup>114</sup> *Prince*, 321 U.S. at 164-65.

<sup>115</sup> *Id.* at 170.

<sup>116</sup> 455 U.S. 745 (1982).

<sup>117</sup> *Id.* at 747-48.

the healthy, well-rounded growth of young people in to full maturity as citizens, with all that implies.” Thus, “the whole community” has an interest “that children be both safeguarded from abuses and given opportunities for growth into free and independent and well-developed . . . citizens.”<sup>118</sup>

Here, the dissenters invoke *Prince* as an indispensable precedent for the proposition that the state’s interest in children may sometimes trump parental liberty and free exercise rights – and even the child’s free exercise rights. Indeed, it is puzzling that *Prince* did not lead to a different holding in *Wisconsin v. Yoder*,<sup>119</sup> especially given Justice Douglas’s concerns over the impact of keeping a child out of school.<sup>120</sup> I concur with Greene, however, that a key factor in *Yoder* was Chief Justice Burger’s “recognition of the value of the separatist Amish nomic community.”<sup>121</sup> Indeed, the majority states: “We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles.”<sup>122</sup> In effect, there was a congruence between Amish values and venerated American values: the Amish parents and community were producing good (read: self-sufficient) citizens,<sup>123</sup> and thus the parents’ voluntary separation would not harm their children. Burger does call for agnosticism and modesty about whether “today’s majority is ‘right’ and the Amish and others like them are ‘wrong,’” stating that “a way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.”<sup>124</sup> The majority is *not* agnostic, however, about whether the Amish are a heartening reminder of the worthy yeomen farmers of old, a venerated part of America’s past.<sup>125</sup>

This caselaw aptly illustrates the divided authority over children within the U.S. constitutional order. Moreover, the Court has stated that children themselves possess constitutional rights, even if the scope of those rights is not coterminous with the constitutional rights of adults. This adds to what Greene

---

<sup>118</sup> *Id.* at 790 (Rehnquist, J., dissenting) (alteration in original) (citations omitted) (quoting *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981); *Prince*, 321 U.S. at 165, 168).

<sup>119</sup> 406 U.S. 205 (1972) (holding that Amish children could not be forced to continue their formal education beyond eighth grade because their parents’ First Amendment right to free exercise of religion outweighed the state’s interest in regulating the duration of basic education).

<sup>120</sup> *Id.* at 241-43 (Douglas, J., dissenting in part) (arguing that children’s free exercise claims must also be considered when deciding the free exercise claims of their parents).

<sup>121</sup> Greene, *supra* note 28, at 16.

<sup>122</sup> *Yoder*, 406 U.S. at 223-24.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* Greene also quotes this language in his work. See Greene, *supra* note 28, at 16.

<sup>125</sup> *Yoder*, 406 U.S. at 223-24.

might call the fracturing of power or authority. Sometimes children's rights empower them vis-à-vis government entities, like public schools, where they have constitutional rights to freedom of speech, subject to certain limits.<sup>126</sup> In other situations children's rights protect them from the arbitrary or overweening exercise of governmental power, even under the guise of benevolent paternalism, as in the context of the juvenile justice system.<sup>127</sup> Children's rights may also empower them vis-à-vis their parents, such as when a pregnant female adolescent may seek a judicial bypass from a parental consent or notification law<sup>128</sup> or when an adolescent may get certain forms of medical treatment without parental consent.<sup>129</sup>

Despite these constitutional rights and certain statutory entitlements, children are still a highly vulnerable population. They are vulnerable because they depend on others to meet their basic material, physical, and emotional

---

<sup>126</sup> *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), is the high water mark for students' First Amendment speech rights in school. Declaring that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the Court upheld students' freedom of expression in school unless it substantially disrupts or interferes with the operation of the school or collides with the rights of others. *Id.* at 506, 513. Subsequent cases recognized categories or contexts in which school officials have authority to restrict student speech, even apart from the *Tinker* framework. See *Morse v. Frederick*, 551 U.S. 393, 406, 410 (2007) (observing that "the rule of *Tinker* is not the only basis for restricting student speech," and holding that it was "reasonable" for a school principal to conclude that a student-made banner displayed at a school-sanctioned activity "promoted illegal drug use – in violation of established school policy – and that failing to act would send a powerful message to the students in her charge . . . about how serious the school was about the dangers of illegal drug use"); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (upholding school authority to exercise "editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns"); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (upholding the school's authority to suspend a student for "offensively lewd and indecent speech" during a high school assembly).

<sup>127</sup> See *In re Gault*, 387 U.S. 1, 27-28 (1967) (holding that children are entitled to certain due process protections in juvenile proceedings and observing that "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court").

<sup>128</sup> See *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (holding that a state law requiring parental notice and consent for a minor female's abortion must give the minor the opportunity to go directly to court without first consulting or notifying her parents, and if she satisfies the court she is mature and informed enough to make the decision on her own, she must be permitted to act without parental consent).

<sup>129</sup> Most states treat minors as emancipated – and thus allow them to seek medical treatment without parental consent – for "health problems that minors might want to conceal from their parents, and thus might not seek to have treated if parental consent were required," such as "drug abuse, alcohol abuse, pregnancy, and venereal disease." DOUGLAS E. ABRAMS & SARAH H. RAMSEY, *CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE* 717 (4th ed. 2010).

needs, and the failure of others to provide those needs can impair their healthy development in many ways. Children also lack formal political representation and often lack legal representation in many matters affecting their lives. They are also vulnerable because the legal system entrusts parents, guardians, and public institutions with enormous power over them. According to Supreme Court jurisprudence, the premise for this allocation of authority is that parents possess exactly what children lack and naturally act in the best interests of their children. As Chief Justice Burger explained in *Parham v. J.R.*,<sup>130</sup> which affirmed the right of parents to commit their children to mental health institutions without a pre-commitment hearing:

Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.<sup>131</sup>

In *Parham*, these posited differences between children and adults served to empower parents – as well as child protective service officials with no “natural” bonds of affection to their charges – and to disempower children with respect to mental health care. In the Court's Eighth Amendment jurisprudence, however, these differences between children and adults have weighed in children's favor. In a trio of cases, the Court has held that it violates the Eighth Amendment's ban on cruel and unusual punishment to subject minors to the death penalty,<sup>132</sup> to categorical sentences of life without parole for non-homicide crimes,<sup>133</sup> and, most recently, to mandatory life without parole sentences for homicide crimes.<sup>134</sup> The Court's reasoning stresses the “diminished culpability of juveniles” due to “[t]hree general differences between juveniles under 18 and adults”: (1) “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults,” which “often result in impetuous and ill-considered actions and decisions”;<sup>135</sup> (2) greater vulnerability and susceptibility to “negative influences and outside pressures, including peer pressure”;<sup>136</sup> and (3) “the character of a juvenile is not as well formed as that of an adult.”<sup>137</sup> In *Miller* the Court explained that *Roper* and *Graham*, which “establish[ed] that children

---

<sup>130</sup> 442 U.S. 584 (1979).

<sup>131</sup> *Id.* at 602.

<sup>132</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>133</sup> *Graham v. Florida*, 130 S. Ct. 2011 (2010).

<sup>134</sup> *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

<sup>135</sup> *Roper*, 543 U.S. at 569 (alteration in original) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 570.

are constitutionally different from adults for purposes of sentencing,” rest “not only on common sense – on what ‘any parent knows’ – but on science and social science as well,” including studies of child development and brain science.<sup>138</sup> Pertinent to the question of where children fit in Greene’s scheme of multiple sources of authority and rights of exit, the Court also observes that family is among those “negative influences and outside pressures,” and that children have “limited ‘contro[l] over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing situations.”<sup>139</sup>

One way to express the fractured – or divided – authority over children is to say that children are neither the “mere creature[s] of the state” nor simply creatures of their parents.<sup>140</sup> However, they often live subject to multiple sources of authority. How does Greene’s model address children? In particular, in seeking the maximum amount of opt outs to accommodate our “plural obligations,” does his theory take seriously enough the rights, interests, and needs of children?

The place of children in Greene’s framework is difficult to gauge from just the analysis included in *Against Obligation*. My concern is that his theory would insufficiently protect children. Then again, I have doubts about whether or not I am correct about this – due not to agnosticism but simply to a lack of information. I will first discuss the concrete examples Greene offers about the status of children. I will then turn to an example he does not discuss and ask how he would resolve it. This example, far from being hypothetical, is all too real and prevalent: the failure of private and public institutions, despite mandatory reporting laws, to report and address the sexual abuse of children within those institutions.

B. *How Do Children Fare in Greene’s System of Accommodating Plural Obligations?*

1. Cases and Contexts Greene Discusses

a. *Partial Exit*

In *Against Obligation* Greene discusses the *Kiryas Joel* case<sup>141</sup> as posing the “problem of partial exit,” as well as “a hard question about the limits of

---

<sup>138</sup> *Miller*, 132 S. Ct. at 2464 & n.5 (stating that “the evidence presented to us in these cases indicates that the science and social science supporting *Roper*’s and *Graham*’s conclusions have become even stronger”).

<sup>139</sup> *Id.* at 8 (alteration in original) (quoting *Roper*, 543 U.S. at 569).

<sup>140</sup> See STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 99 (2000); *id.* at 243 (“The justification for some measure of public authority lies in the fact that children are not simply creatures of their parents, but independent persons with their own lives to lead.”).

<sup>141</sup> Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet (*Kiryas Joel*), 512 U.S. 687 (1994).



governmental efforts to aid a small religious group.”<sup>142</sup> To give a brief account: the Satmar Hasidim, a Jewish religious sect, purchased property and incorporated as the Village of Kiryas Joel.<sup>143</sup> This group represents a “partial exit” case because it “wanted to exist separately and live according to its own norms and to possess certain attributes of state power.”<sup>144</sup> Members of the sect attempted to send their children with handicaps to local, heterogeneous county schools, but the children “had a hard time dealing with immersion in the non-Satmar world,”<sup>145</sup> and parents withdrew them from the secular schools “citing ‘the panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different.’”<sup>146</sup> The Satmars successfully “lobbied the state legislature for a special school district . . . [to] alleviate the emotional trauma of their handicapped children.”<sup>147</sup> Greene believes that the Supreme Court was wrong to hold the law unconstitutional as violating the Establishment Clause.<sup>148</sup> He counters: “We should see *Kiryas Joel* as about a group that wants to live by itself and operate private institutions and to exercise appropriate public power.”<sup>149</sup> Thus, “so long as the Satmars are willing to abide by constitutional rules when exercising such power, there should be no constitutional barrier to the state’s ceding them the public as well as private attributes of sovereignty.”<sup>150</sup>

In other work Greene elaborates his critique of the Court’s *Kiryas Joel* opinion, arguing that the Satmars were not “us[ing] governmental power to teach religious doctrine in public schools,” which would be unconstitutional.<sup>151</sup> Greene further argues that the Satmars were not discriminating “against other religions in the granting of governmental benefits” – another constitutional problem under the First Amendment.<sup>152</sup> Their school was “formally open regardless of religion [but] only Hasidic parents chose to send their kids there.”<sup>153</sup>

To assess Greene’s model of partial exit, we would need to know more about how children fare when nomic communities both live apart and “exercise appropriate public power.”<sup>154</sup> Are there, for example, other instances of

---

<sup>142</sup> GREENE, *supra* note 1, at 145-46.

<sup>143</sup> *Kiryas Joel*, 512 U.S. at 691.

<sup>144</sup> GREENE, *supra* note 1, at 146.

<sup>145</sup> *Kiryas Joel*, 512 U.S. at 713.

<sup>146</sup> *Id.* at 692 (alteration in original) (quoting Bd. of Educ. v. Wieder, 527 N.E.2d 767, 770 (1988)).

<sup>147</sup> GREENE, *supra* note 1, at 146.

<sup>148</sup> *Id.* at 147.

<sup>149</sup> *Id.* at 148.

<sup>150</sup> *Id.*

<sup>151</sup> Greene, *supra* note 28, at 5.

<sup>152</sup> *Id.*

<sup>153</sup> GREENE, *supra* note 1, at 146-47.

<sup>154</sup> *Id.* at 148.

religious communities exercising public power that Greene would support? What are the consequences of this kind of delegation of public power for the development of children into free and equal citizens capable of participating in democratic self-government? In his article analyzing *Kiryas Joel*, Greene acknowledges:

It might or might not be a good thing for the health of the Republic that certain groups want to live on their own and simultaneously exercise governmental power. But so long as such groups exercise governmental power in a constitutional fashion, our opposition to balkanization should take a form other than judicial injunctions against separation.<sup>155</sup>

Much turns on how Greene and others read “in a constitutional fashion” and whether there is to be any accountability to public authorities for the actual exercise of this public power. The example of child sexual abuse, as I discuss below, raises the problem of religious authorities – including those in some Orthodox Jewish “nomic” communities – discouraging people from availing themselves of civil law or complying with mandatory reporting laws. Suppose a religious community sought public authority to address child sexual abuse within its community?

b. *Education and Illiberal Groups*

Greene is agnostic, in *Against Obligation*, about “whether the state should ensure that all children receive at least some education out from under the control of their parents.”<sup>156</sup> He would, however, “permit (and encourage) the state to expose all of its citizens – even those living in illiberal communities – to liberal views and to options of how to live apart from one’s community.”<sup>157</sup>

In discussing when illiberal groups should be exempted from laws, Greene focuses primarily on explaining his “deferential [position] to (even illiberal) persons/groups desiring to depart from law and live by their own lights.”<sup>158</sup> Those “lights,” recall, may “raise equality concerns” because some exemptions will be sought for practices that “involve matters of gender” that “comprehensive liberals would consider indefensibly unequal treatment of women and girls.”<sup>159</sup> As I argued above, I find it problematic to assume that only comprehensive liberals would see warning flags due to unequal treatment. As discussed in Part II, one of Greene’s baselines is “knowing and voluntary choices (by adults) to adhere to various sources of normative authority (or perhaps to do so from felt obligation).”<sup>160</sup> He admits the “toughest set of questions” about his approach concerns “what counts as knowing and

<sup>155</sup> Greene, *supra* note 28, at 8.

<sup>156</sup> GREENE, *supra* note 1, at 158.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 157.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

voluntary choice by adults to enter and remain within a group.”<sup>161</sup> Another baseline is his “agnosticism” about “whether we (even comprehensive liberals) have reached the truest or best answers regarding the just or the good.”<sup>162</sup> Greene would resolve these opt-out and exemption issues with a balancing test: “We must balance harm caused by practices to which we might defer against the harm to the (usually) minority person/group if an exemption is denied.”<sup>163</sup> As seen in Part II, physical violence is an easy case of no deference.<sup>164</sup> But what about educational choices?

If there are concerns about whether adults have made “voluntary” choices, these concerns seem magnified in the case of children. The concern increases dramatically if Greene’s agnosticism leads to a stance that, contrary to the dual-authority model for children’s education, parents may control their children’s education entirely. In his previous work, Greene rejected these sorts of parentalism manifestos because they are contrary to a model of divided or fractured power and multiple sources of authority.<sup>165</sup> Indeed, as he acknowledges, elsewhere he has advanced the idea that overruling *Pierce* would be consistent with a model of multiple repositories of power.<sup>166</sup> As he once explained, it would not be inconsistent with a “commitment to divided power” to “insist that all children attend public schools,” since parents “would [still] be able to influence directly an enormous proportion of a child’s time (all the time not in school) and teachers and children of various walks of life would be able to influence another, smaller proportion.”<sup>167</sup> In another article Greene argues that overruling *Pierce* and requiring public schooling ensures “that children are exposed to multiple sources of value.”<sup>168</sup> He also states that while keeping *Pierce* may counteract the “public school monopoly,” it also ensures “that the formal education of children is dictated solely by parental choice.”<sup>169</sup> How Greene assesses the comparative harms here is instructive in light of his subsequent agnosticism: overruling *Pierce* “harms religions that insist on nonexposure to competition,” while retaining *Pierce* “harms the ability of each child to become an adult who can then choose what sort of religious or secular

---

<sup>161</sup> *Id.* at 158.

<sup>162</sup> *Id.* at 157.

<sup>163</sup> *Id.* at 157-58.

<sup>164</sup> *Id.* at 158.

<sup>165</sup> See Greene, *Civil Society*, *supra* note 73, at 489-92 (rejecting proposals that grant “virtually nonregulable education power to parents” in order to stay “true to our Constitution’s core principle of nonconcentrated power”).

<sup>166</sup> For Greene’s earlier work advocating the overruling of *Pierce*, see, for example, *id.* at 491 (pointing out that his idea of insisting all children attend public school would require overruling *Pierce*), and Greene, *Vouchers*, *supra* note 73, at 406-08.

<sup>167</sup> Greene, *Civil Society*, *supra* note 73, at 491.

<sup>168</sup> Greene, *Vouchers*, *supra* note 73, at 408.

<sup>169</sup> *Id.* at 408.

life he or she wishes to lead.”<sup>170</sup> The pre-agnostic Greene concludes that “[t]he anti-foundationalism and multiple repositories of power predicates of our constitutional order . . . mandate [overruling *Pierce*].”<sup>171</sup>

I have elaborated elsewhere on my own approach to education, which stresses the place of public education (or private education informed by public norms) in government’s formative project.<sup>172</sup> I have also argued that government should permit but regulate home schooling and, even then, require that home-schooled children participate in a civic education program in a public school.<sup>173</sup> I would urge Greene not to remain agnostic on whether “the state should ensure that all children receive at least some education out from under the control of their parents.”<sup>174</sup> Otherwise, children of adults in nomic communities are the losers in Greene’s multiple sovereignty scheme, since parental sovereignty no longer seems “permeable,” but “absolute.”<sup>175</sup> How, after all, is the state to “expose” citizens to “liberal views and to options of how to live apart from one’s community”<sup>176</sup> if nomic communities may live apart and even exercise public authority, for example, over education?

2. One Case Greene Does Not Discuss: The Relationship Between the Authority of Government and the Authority of Nomic Communities Concerning the Abuse of Children

How would Greene analyze how far nomic communities can escape the “clutches” of the state with respect to state laws designed to protect children from abuse, particularly sexual abuse? I do not refer here to whether his scheme would exempt parents and guardians from child abuse and neglect laws. Of course, Greene does not believe that the freedom of nomic communities can include the right to physically abuse wives or children.<sup>177</sup> As Marci Hamilton points out, the scope of constitutionally protected religious liberty does not include – and has never included – “licentiousness” (a term applied to child sexual abuse); thus, the sexual abuse practices that sometimes take place in religious organizations “are not [typically] supported by the religious beliefs of these organizations.”<sup>178</sup> I ask instead how Greene’s

---

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> See FLEMING & MCCLAIN, *supra* note 16, at 112-45; MCCLAIN, *supra* note 16, at 60-84; Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 *FORDHAM L. REV.* 1617, 1654-55, 1659 (2001).

<sup>173</sup> FLEMING & MCCLAIN, *supra* note 16, at 139-45.

<sup>174</sup> GREENE, *supra* note 1, at 158.

<sup>175</sup> For Greene’s distinction between “absolute” and “permeable” state sovereignty, see *id.* at 2-3.

<sup>176</sup> *Id.* at 158.

<sup>177</sup> *Id.*

<sup>178</sup> Marci A. Hamilton, *The “Licentiousness” in Religious Organizations and Why It Is Not Protected Under Religious Liberty Constitutional Provisions*, 18 *WM. & MARY BILL*

argument against a general obligation to obey the law and in favor of maximum accommodation of nomic communities would evaluate the problem. How would it address the fact that children suffer forms of physical abuse, particularly sexual abuse, within institutions to which parents frequently entrust their children? How would it address the fact that those institutions ignore mandatory reporting laws, conceal the abuse, and fail to protect children? Examples abound involving religious institutions like the Catholic Church, youth organizations like the Boy Scouts of America, and public and private educational institutions, including colleges, universities, and related programs.

Child protection laws raise two questions for Greene's model of permeable sovereignty and his agnosticism. First, what if these nomic communities argue that they should be exempt from reporting laws because they have their own internal processes – "laws" – concerning how to deal with suspected sexual abuse of children by their members? Suppose they argue for an entitlement to exercise public authority in these matters. Second, suppose that these institutions do not formally seek exemption from reporting laws but instead simply do not obey them, and do not feel bound to obey them. The reasons for this lack of obedience and compliance could be manifold, including institutional self-interest and self-protection. Secrecy and concealment help avoid tarnishing an institution's reputation and bad publicity, which Marci Hamilton documents as "the rules against scandal."<sup>179</sup> Another reason could be that the institution believes its own internal processes are preferable, or that suspected child abusers should be forgiven and given a second chance rather than turned over to public authorities.<sup>180</sup> Whatever the reason, noncompliance poses serious risks for the victims of child abuse, including a lack of institutional accountability, a failure to protect present and future victims, and a lack of empathy for the victims themselves.

As I was reading Greene's book and organizing my response to it, I was struck by two front-page stories in the *New York Times* on June 23, 2012: *Cardinal's Aide Is Found Guilty in Abuse Case*<sup>181</sup> and *Sandusky Guilty of Sexual Abuse of 10 Young Boys*.<sup>182</sup> Underlying each of these stories is a lack of accountability for child sexual abuse by institutional actors. I discuss these examples because they highlight the issues of trust and the abuse of trust in

---

RTS. J. 953, 956 (2010). Hamilton argues that fundamentalist polygamists are the exception in that they do appeal to religious scriptures and beliefs. *Id.* at 957.

<sup>179</sup> Marci A. Hamilton, *The Rules Against Scandal and What They Mean for the First Amendment's Religion Clauses*, 69 MD. L. REV. 115 (2009) (explaining how the principle of internal secrecy (the "scandal rule") runs across religious entities).

<sup>180</sup> See discussion *infra* Part IV.B.2.a.

<sup>181</sup> Jon Hurdle & Erik Eckholm, *Cardinal's Aide Is Found Guilty in Abuse Case*, N.Y. TIMES, June 23, 2012, at A1.

<sup>182</sup> Joe Drape, *Sandusky Guilty of Sexual Abuse of 10 Young Boys*, N.Y. TIMES, June 23, 2012, at A1.

non-state and educational institutions. They also illustrate the vulnerability of children to abuse within these institutions due to institutional culture and noncompliance with civil laws designed to protect children.

a. *Child Sex Abuse in the U.S. Roman Catholic Church*

The first headline concerns the criminal conviction of Monsignor William J. Lynn, of the Archdiocese of Philadelphia, for child endangerment. This is reportedly the first time a “senior official of the Roman Catholic Church in the United States” has been “convicted of covering up sexual abuses by priests under his supervision.”<sup>183</sup> As secretary for the clergy of the 1.5-million-member archdiocese from 1992 to 2004, Lynn’s duties included recommending priest assignments and investigating abuse complaints.<sup>184</sup> The *New York Times* story reported that “[p]rosecutors presented a flood of evidence that Monsignor Lynn had not acted strongly to keep suspected molesters away from children, let alone to report them to law enforcement.”<sup>185</sup> The District Attorney in the case stated that the verdict had sent a message to the nation: “This monumental case will change the way business is done in many institutions.”<sup>186</sup>

Why did this senior official within the nomic community of the Catholic Church believe he did not have to report suspected child abuse? For example, one critical piece of evidence in the case was a list Lynn made in 1994 of three dozen active priests who had been credibly accused of sex abuse.<sup>187</sup> Lynn let one priest live in a parish rectory even after a medical recommendation that he should be kept away from children.<sup>188</sup>

The numerous lawsuits brought against the Catholic Church for alleged sex abuse by priests are familiar.<sup>189</sup> The Catholic Church has reportedly paid “more than \$2 billion in abuse settlements in the United States alone in the past decade.”<sup>190</sup> To be clear, problems of sexual abuse of children by clergy are not unique to the Catholic Church.<sup>191</sup> Hamilton has studied this general problem extensively, including the reasons for institutional cover-ups of such abuse.<sup>192</sup> She argues that in the various religious communities where there has been

---

<sup>183</sup> Hurdle & Eckholm, *supra* note 181.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 12-31 (2005) (discussing sexual abuse cases involving the Catholic Church and other religious institutions).

<sup>190</sup> Rachel Donadio, *Under Fire, Vatican Publishes Its Procedures for Handling Sex Abuse Cases*, N.Y. TIMES, Apr. 13, 2010, at A4.

<sup>191</sup> See, e.g., HAMILTON, *supra* note 189, at 12-31.

<sup>192</sup> See generally Hamilton, *supra* note 179.

sexual abuse and then “furthering [of] the abuse through hierarchical cover-up,” one can find “an acknowledged rule (or theological principle) that forbade the airing of dirty laundry to outsiders.”<sup>193</sup> She refers to this as a rule against “scandal.”<sup>194</sup> She offers a historical example of a 1962 document in the Roman Catholic Church detailing a secret procedure for handling sexual offenses and threatening excommunication for those who broke their silence.<sup>195</sup> Hamilton observes that in the 1980s, “an internal report was offered to the U.S. Catholic Bishops that cast the phenomenon of clergy abuse in terms of an epidemic of clergy abuse cases waiting to explode.”<sup>196</sup> However, “the perceived need for silence led the church to pretend publicly that it harbored no pedophiles, so that across the country cardinals, archbishops, and bishops shuffled known pedophiles from parish to parish without notice to anyone, leaving behind a trail of young victims.”<sup>197</sup> In 2002 a team of investigative reporters broke the Pulitzer Prize-winning story of the role of the Boston Archdiocese in the hierarchical cover up of child sexual abuse and the “persistent transfer of pedophile priests by bishops.”<sup>198</sup> The reporters characterized their story as one of “a large number of Catholic priests who abused both the trust given them and the children in their care.”<sup>199</sup> As Hamilton puts it:

While there had been trickles of information to the public before then, it was not until the larger picture of the Catholic hierarchy’s handling of abuse that the public started to comprehend that its practices were uniform across dioceses, and even other countries, and then that such practices were not peculiar to the Catholic Church.<sup>200</sup>

This public disclosure triggered several institutional responses by the Catholic Church in the United States. One response was that the United States Conference of Catholic Bishops (USCCB) tasked a National Review Board to

---

<sup>193</sup> *Id.* at 119.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 119 n.20 (citing THE SUPREME AND HOLY CONGREGATION OF THE HOLY OFFICE, INSTRUCTION ON THE MANNER OF PROCEEDING IN CASES OF SOLICITATION (1962), available at <http://image.guardian.co.uk/sys-files/Observer/documents/2003/08/16/Criminales.pdf>); see also Hamilton, *supra* note 178, at 961-65 (documenting mainstream Mormon Church texts “that operate to keep child sex abuse secret”).

<sup>196</sup> HAMILTON, *supra* note 189, at 15, 315-16 n.4 (citing MICHAEL PETERSON, F. RAY MOUTON & THOMAS P. DOYLE, THE PROBLEM OF SEXUAL MOLESTATION BY ROMAN CATHOLIC CLERGY: MEETING THE PROBLEM IN A COMPREHENSIVE AND RESPONSIBLE MANNER 2, 10 (1985), available at [http://www.bishop-accountability.org/reports/1985\\_06\\_09\\_Doyle\\_Manual/DoyleManual\\_NCR\\_combined.pdf](http://www.bishop-accountability.org/reports/1985_06_09_Doyle_Manual/DoyleManual_NCR_combined.pdf)).

<sup>197</sup> *Id.* at 15.

<sup>198</sup> Hamilton, *supra* note 179, at 119 (citing THE INVESTIGATIVE STAFF OF THE BOSTON GLOBE, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH 3 (2002) [hereinafter BETRAYAL]); see also HAMILTON, *supra* note 189, at 16-17.

<sup>199</sup> Hamilton, *supra* note 179, at 119 n.19 (quoting BETRAYAL, *supra* note 198, at 3).

<sup>200</sup> Hamilton, *supra* note 178, at 954.

help the USCCB “police themselves” in the sex abuse crisis.<sup>201</sup> The National Review Board commissioned a “descriptive study of the nature and scope of sexual abuse of minors by Catholic clergy in the United States.”<sup>202</sup> In 2002 the National Conference of Catholic Bishops adopted a “Charter for the Protection of Children and Young People,” entitled “Promise to Protect, Pledge to Heal,” which was approved by the full body of U.S. Catholic Bishops in June 2005.<sup>203</sup> The preamble to the Charter begins by noting institutional failure, using the dual language of sin and crime:

Since 2002, the Church in the United States has experienced a crisis without precedent in our times. The sexual abuse of children and young people by some deacons, priests, and bishops, and the ways in which these crimes and sins were addressed, have caused enormous pain, anger, and confusion. As bishops, we have acknowledged our mistakes and our roles in that suffering, and we apologize and take responsibility again for too often failing victims and the Catholic people in the past. . . .

. . . We have agonized over the sinfulness, the criminality, and the breach of trust perpetrated by some members of the clergy. . . .

. . . The loss of trust that is often the consequence of such abuse becomes even more tragic when it leads to a loss of the faith that we have a sacred duty to foster. We make our own the words of His Holiness, Pope John Paul II: that the sexual abuse of young people is “by every standard wrong and rightly considered a crime by society; it is also an appalling sin in the eyes of God.”<sup>204</sup>

The Charter announced a zero-tolerance policy. In speaking about sin *and* crime, it acknowledged the proper role of civil authorities to address child sexual abuse, even as it spoke about “healing and reconciliation” with regard to the victims of the abuse.<sup>205</sup> In effect, the Charter speaks a dual language: the Church’s “first obligation” is to help the victims of sexual abuse find healing, repair the breach of trust, and promote reconciliation within the religious community.<sup>206</sup> The Charter also committed dioceses to adopting “policies and procedures . . . to respond promptly to any allegation where there is reason to

---

<sup>201</sup> A U.S. Catholic Interview, *We Can Do Better: Responding to Sex Abuse 10 Years Later*, U.S. CATH., June 2012, at 18, 18, available at <http://www.uscatholic.org/church/2012/06/we-can-do-better-responding-sex-abuse-10-years-later> [hereinafter, *We Can Do Better*].

<sup>202</sup> U.S. CONFERENCE OF CATHOLIC BISHOPS, PROMISE TO PROTECT, PLEDGE TO HEAL: CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE 7 (rev. ed. 2011).

<sup>203</sup> This information appears on the copyright page of the USCCB Charter. *Id.* A second revision of the Charter was approved in June 2011. *Id.*

<sup>204</sup> *Id.* at 3-4 (quoting Pope John Paul II, Address to the Cardinals of the United States and Conference Officers (Apr. 23, 2002)).

<sup>205</sup> *Id.* at 9.

<sup>206</sup> *Id.*



believe that sexual abuse of a minor has occurred.”<sup>207</sup> Significantly, “[d]ioceses/eparchies are to report an allegation of sexual abuse of a person who is a minor to the public authorities” and are “to comply with all applicable civil laws with respect to the reporting of allegations of sexual abuse of minors to civil authorities and cooperate in their investigation in accord with the law of the jurisdiction in question.”<sup>208</sup> Dioceses and eparchies are also “to advise victims of their right to make a report to public authorities and support this right.”<sup>209</sup>

The Charter also commits to internal procedures to remove priests accused of sexual abuse from ministry. First, it states that “[s]exual abuse of a minor by a cleric is a crime in the universal law of the Church,” in addition to being “a crime in all civil jurisdictions in the United States.”<sup>210</sup> Henceforth, even a single act of sexual abuse of a minor “which is admitted or established after an appropriate process in accord with canon law” should result in an offending priest or deacon being “permanently removed from ministry and, if warranted, dismissed from the clerical state.”<sup>211</sup> Reflecting the dual track of crime and sin, of accountability and of healing, the Charter states that “an offending priest or deacon is to be offered therapeutic professional assistance both for purposes of prevention and also for his own healing and well-being.”<sup>212</sup>

To ensure “the accountability” of the USCCB’s procedures, the Charter renewed the “mandate” of the Ad Hoc Committee on Sexual Abuse, giving it the status of a “standing committee” of the USCCB charged with advising the USCCB on “all matters relating to child and youth protection.”<sup>213</sup> Notably, the Charter calls for annual public reporting on “the progress made in implementing and maintaining the standards in this *Charter*,” including the names of dioceses and eparchies not in compliance with the Charter.<sup>214</sup>

Finally, to advance the goal of child protection, the Charter envisions cooperation with “parents, civil authorities, educators, and community organizations to provide education and training for children, youth, parents, ministers, educators, volunteers, and others about ways to make and maintain a safe environment for children and young people.”<sup>215</sup> Here, instead of insulating the Church from the state, the Charter calls for collaboration and cooperation, including utilizing “the resources of law enforcement and other community

---

<sup>207</sup> *Id.* at 10.

<sup>208</sup> *Id.* at 11.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 11-12.

<sup>212</sup> *Id.* at 12.

<sup>213</sup> *Id.* at 13.

<sup>214</sup> *Id.* at 13-14 (calling for the Secretariat of Child and Youth Protection, a position established by the USCCB, to make annual reports including the names of dioceses/eparchies not in compliance with the Charter).

<sup>215</sup> *Id.* at 16.

agencies” to evaluate the background of all personnel “whose duties include ongoing, unsupervised contact with minors.”<sup>216</sup>

Despite the Charter’s aims, the Catholic Church in the United States and abroad continues to face lawsuits for failing to protect children against sexual abuse. In 2010, in the face of accusations that it had covered up abuse and obstructed justice, the Vatican published its procedures for handling sex abuse cases.<sup>217</sup> That policy “spelled out for the first time that [the Vatican] now strongly urges bishops to report abuse cases to civil authorities if required by local law.”<sup>218</sup> In a striking comment, when asked how bishops would know they were expected to report abuse to civil authorities if canon law did not specify it, the Vatican spokesman, Reverend Federico Lombardi, replied: “Because they’re citizens of a state.”<sup>219</sup> Lombardi “conceded,” however, that such reporting had not always happened.<sup>220</sup>

Why had it not happened? Lombardi’s answer, after all, seems to suggest that Catholic officials – as citizens of a state – should know of their legal obligations and should obey the law. Why did this nomic community resist the “clutches” of the state with respect to state laws aimed at protecting children? Why did it believe that its sovereignty entailed an entitlement to follow its own procedures and not to involve the authority of the state? I am confident that, given this example, Greene would not embrace this rejection of child protection law as a good example of a nomic community living by its own laws and exiting from civil laws. Even so, this example illustrates the risks of a view that the state is simply one more source of authority among others and that it must compete with other sources for citizens’ loyalty and allegiance.

Instructive on this issue is a U.S. Catholic interview with Nicholas Cafardi, a charter member of the National Review Board, tasked with assisting the USCCB in addressing the sex-abuse crisis.<sup>221</sup> The interview took place in 2012, ten years after the “height of the sex abuse crisis” in 2002 and the year the Bishops adopted the Charter.<sup>222</sup> The interviewer poses questions that highlight clashes between the different value systems of nomic communities and civil law: “Did bishops look at sex abuse through the lens of sinfulness rather than law and negligence?”<sup>223</sup> Yes, Cafardi answers: “I think most bishops saw it as a sin, and sin in our church gets forgiven. Other aspects weren’t always part of the analysis.”<sup>224</sup> Cafardi explains what church officials

---

<sup>216</sup> *Id.*

<sup>217</sup> Donadio, *supra* note 190.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *We Can Do Better*, *supra* note 201.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

did instead of following mandatory reporting laws and reporting suspected abuse to public authorities:

When the National Review Board saw the reports from other dioceses, we learned that a priest accused of abuse would come in and tell the bishop, “I’m sorry, it’ll never happen again.” And since we are a church that believes in forgiveness and redemption, that sometimes carried the day.

In the early days a priest-abuser got sent away for a 30-day retreat; then he would be back on the job in another part of the diocese where nobody knew him.

At least later on they started sending them to treatment. So even though I criticize the therapeutic approach, and rightly I think, it actually was an improvement on what had been done before.<sup>225</sup>

There was a clash between the Catholic Church’s view of sex abuse – informed by notions of sin, forgiveness, and redemption – and the public authorities’ view of it. To some leaders within the Catholic Church, reassigning a priest and keeping silent about the suspected abuse was a chance at redemption, not deliberate endangerment of children. Of course, Greene’s theory balances harms, and I assume it would not permit exemptions when they harm not only the liberty but also the bodily integrity and wellbeing of others. Here, vulnerable children are at risk. Why was this religious community – this sovereign with its own norms and powers – seemingly indifferent to the actual and potential harm to children if a priest was not removed from active ministry and reported to public authorities?

Hamilton might argue that the “rule against scandal” offers one answer.<sup>226</sup> Cafardi suggests some other factors. For instance, “Rome originally saw this as an American problem,” as Anglo Saxons “overreact[ing] to sexual issues.”<sup>227</sup> Cafardi explains that this was true, but in a different way. It was not that the problem manifested in America first because of sexual “prudery,” but because in civil law systems, it is hard “to sue somebody for a wrongful act,” while the U.S. legal system allows suits to remedy harms.<sup>228</sup>

The 2002 Charter, Cafardi observes, instantiated a new set of norms, including “the obligation to report to civil authorities as soon as you know about an accusation” and to remove a priest from the ministry upon credible evidence of abuse and permanently upon the establishment of guilt.<sup>229</sup>

---

<sup>225</sup> *Id.*

<sup>226</sup> Hamilton, *supra* note 179, at 122 (discussing how a “principle of internal secrecy” within religious entities creates an effective rule barring communication about potentially scandalous or damaging events or behaviors to the outside world).

<sup>227</sup> *We Can Do Better*, *supra* note 201.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* Even so, the Church does not require laicization: clergy found to have committed abuse are allowed to remain priests and “say their daily private mass” and “get their retired

The Charter replaces the old model of sin and forgiveness, pursued at the expense of children, with a model of new norms of accountability and child protection. The Charter retains a religious framework of sin, healing, and reconciliation even as it acknowledges the proper role of civil authority and mandatory reporting. Cafardi himself uses a religious framework to explain why the emphasis upon child protection and removal from the ministry is justified:

[O]ur theology says that a priest functions as an icon of Christ. If through his sexual abuse of a child he has so disfigured the Christ icon, I don't see how you get that back. If you lose the ability to be an icon of Christ through something you've done, then I don't see how you haven't also lost the ability to function as a priest.<sup>230</sup>

I contend that a model of competing sovereigns in which the state's norms and values – such as child protection – hold no special weight is not up to the task of addressing the problem of the sexual abuse of children on the massive scale on which that abuse evidently occurs. The steps the USCCB has taken to address the problem include making the Church more accountable and recognizing the obligation to comply with civil law, not seeking exemptions from such law.

b. *Child Sex Abuse at Penn State*

The second news story is about Penn State's failure to comply with mandatory reporting laws and the reasons for that failure. The *New York Times* reported the criminal conviction of Jerry Sandusky, a "onetime local hero" and former Penn State assistant football coach, for rape and sodomy of young boys, all from "disadvantaged homes."<sup>231</sup> These boys were in the proximity of Sandusky due to his charity, The Second Mile, founded to work with troubled youths.<sup>232</sup> Sandusky used "his access to the university's vaunted football program" and "befriended" and "violated" the children.<sup>233</sup> The criminal charges brought against Sandusky rocked Penn State, leading to criminal and perjury charges against the athletic director and university official who oversaw the university police, the dismissal of the university's longtime president, and the firing of famed Head Coach Joe Paterno.<sup>234</sup>

One reason the scandal shook the institution was Penn State's complicity in doing nothing about Sandusky even when prominent officials within the university had reason to know about his sexual abuse of young boys, including

---

priest's stipend"; they are to be monitored to make sure they have no contact with children. *Id.* Cafardi observes that "[t]he problem is that the church is not good at monitoring people or running a prison system for priest abusers." *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Drape, *supra* note 182.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

incidents on the Penn State campus.<sup>235</sup> Just a few weeks after the accusations against Sandusky became public, another front-page story detailed the university's failures in this respect.<sup>236</sup> The trigger for the story was the report by the Special Investigative Counsel, the law firm of former FBI Director Louis J. Freeh.<sup>237</sup> The Special Investigative Counsel was hired by the Penn State trustees to investigate the university's actions with respect to Sandusky's crimes.<sup>238</sup> As the news story put it, the report detailed failures "all the way up the university's chain of command – shortcomings that were the result of *an insular and complacent culture* in which football was revered, rules were not applied and the *balance of power* was dangerously *out of whack*."<sup>239</sup> I emphasize these terms because I want to reflect on what Greene might say about Penn State as a nomic community. Granted, Penn State is a public institution, but my point here goes to how the institution – and the football program in particular – experiences itself as possessing purposes, values, and norms. Indeed, in this Symposium, my colleague Jay Wexler raises the question of whether devotion to a sport could be a "religion" under Greene's scheme.<sup>240</sup>

I turn now from media coverage of the institutional problems at Penn State to the Report of the Special Investigative Counsel (the Freeh Report). Why did checking functions within Penn State not work in this case? Why did Penn State officials not comply with applicable federal and state child sexual abuse reporting requirements? For example, the federal Clery Act – enacted in 1990 and named for Jeanne Clery, a student who was raped and murdered in her dorm room at Lehigh University in 1986<sup>241</sup> – requires Penn State "to collect crime statistics relating to designated crimes, including sexual offenses, occurring on University property, make timely warnings of certain crimes that pose an ongoing threat to the community, and prepare an annual safety report and distribute it to the campus community."<sup>242</sup> The Act also "requires 'Campus Security Authorities,' including coaches and athletic directors, to report crimes

---

<sup>235</sup> *Id.*

<sup>236</sup> Richard Pérez-Peña, *In Report, Failures Throughout Penn State*, N.Y. TIMES (July 12, 2012), <http://www.nytimes.com/2012/07/13/sports/ncaaf/football/in-freeh-report-on-sandusky-failures-throughout-penn-state.html?ref=richardperezpena>. I discuss the report itself *infra*.

<sup>237</sup> FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY (2012) [hereinafter FREEH REPORT], available at <http://progress.psu.edu/the-freeh-report>.

<sup>238</sup> *Id.*

<sup>239</sup> Pérez-Peña, *supra* note 236 (emphasis added).

<sup>240</sup> Jay Wexler, *Some Thoughts on the First Amendment's Religion Clauses and Abner Greene's* Against Obligation, with Reference to Patton Oswalt's Character "Paul from Staten Island" in the Film *Big Fan*, 93 B.U. L. REV. 1363 (2013).

<sup>241</sup> Nina Bernstein, *On Campus, A Law Enforcement System to Itself*, N.Y. TIMES, Nov. 12, 2011, at A1; Pérez-Peña, *supra* note 236.

<sup>242</sup> FREEH REPORT, *supra* note 237, at 110.

to police.”<sup>243</sup> As the report explains, the purpose of the Act, which applies to any institution of higher learning that “participates in federal student financial aid programs,” is “to provide an Institution’s students, parents and employees with information about campus safety so that members of the campus community can make informed decisions to protect themselves from crime.”<sup>244</sup>

Despite Penn State’s clear obligations under the Clery Act, the Freeh Report found that “from approximately 1991 until 2007, university officials delegated Clery Act compliance to the University Police Department’s Crime Prevention Officer (‘CPO’) . . . [who] was not provided any formal training before taking over the position . . . [and does not] recall receiving any Clery Act training until 2007.”<sup>245</sup> Even after 2007, when the director of the university police department transferred “Clery Act compliance responsibility . . . to a departmental sergeant and instituted some Clery Act training programs[,] . . . awareness and interest in Clery Act compliance throughout the University remain[ed] significantly lacking.”<sup>246</sup> When Sandusky was arrested in November 2011, “the University’s Clery Act policy was still in draft form and had not been implemented,” with many employees “unaware that they were required to report incidents” and with “little, if any, training.”<sup>247</sup> This was so despite the fact that in 2009 university administrators “identified compliance with laws and regulations as one of the top 10 risks to the University” that year.<sup>248</sup> As applied to Sandusky’s crimes, three people at Penn State were “obligated to report the 2001 Sandusky incident to the University Police Department.”<sup>249</sup> This incident involved Assistant Coach Mike McQueary, who observed Sandusky with a young boy in the shower in conduct that was “extremely sexual in nature” and “way over the lines.”<sup>250</sup> The three people with reporting obligations were McQueary, Head Coach Joe Paterno, to whom McQueary described the incident, and Athletic Director Timothy M. Curley, with whom McQueary later met and told that he “thought that some kind of intercourse was going on.”<sup>251</sup> The report also found fault with President Graham D. Spanier and Senior Vice President for Finance and Business Gary C. Schultz, who both knew of the 2001 incident. While Spanier and Schultz were technically not “Campus Security Authorities” under the Clery Act, given their “leadership positions” at the university, they “should have ensured” the university’s compliance with regard to the 2001 incident.<sup>252</sup>

---

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 112.

<sup>245</sup> *Id.* at 110.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 118.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 110.

The Freeh Report further found that officials at Penn State failed to comply with Pennsylvania law requiring “individuals who are ‘mandatory reporters’ to report suspected child abuse to the appropriate state agency.”<sup>253</sup> Indeed, the Commonwealth of Pennsylvania charged Curley and Schultz with violating that mandatory reporting law.<sup>254</sup>

Why did Penn State’s athletic program officials and even its vice president and president consider themselves beyond the reach of state criminal law? Did they think their shared sense of purpose – a winning football program – justified silence about Sandusky’s abuse of power? Did they believe their shared purpose justified a lack of accountability? Surely they did not think the sexual abuse was justified; if not, then why did they consider themselves free to elude the “clutches of the state” in terms of cooperating with mechanisms designed to protect children and adolescents? The whole premise behind mandatory reporting is child protection. The failure by Penn State officials to report the 2001 shower incident and other possible abuse, according to the Pennsylvania attorney general and the state police commissioner, put “countless more children at risk of being abused by Jerry Sandusky.”<sup>255</sup> Did these leaders within Penn State think they had no general obligation to obey Pennsylvania law because they knew better how to handle things? What sort of reasoning process should they have followed in sorting out their conflicting loyalties?

What answers does the Freeh Report provide to these questions? In its concluding section, with recommendations for university governance and protection of children in university facilities and programs, the Freeh Report states that the failure of prominent officers at Penn State to “protect children by allowing Gerald A. Sandusky . . . unrestricted and uncontrolled access to Pennsylvania State University . . . reveals numerous individual failings, but it also reveals weaknesses of the University’s *culture*, governance, administration, and compliance policies and procedures for protecting children.”<sup>256</sup> I highlight “culture” in this conclusion because the Freeh Report identifies “[o]ne of the most challenging tasks” the Penn State community faces as conducting “an open, honest, and thorough examination of the culture

---

<sup>253</sup> *Id.* at 117.

<sup>254</sup> *Id.* The Freeh Report quotes the “relevant provision” of the law in effect in 2001 and also quotes the law as amended in 2011. *Id.* at 117. The section in effect in 2001 stated:

Persons who, in the course of their employment, occupation or practice of their profession, come into contact with children shall report or cause a report to be made in accordance with section 6313 (relating to reporting procedure) when they have reasonable cause to suspect, on the basis of their medical, professional or other training and experience, that a child coming before them in their professional or official capacity is an abused child.

*Id.* (quoting 23 PA. CONS. STAT. § 6311 (2001)).

<sup>255</sup> Pete Thamel, ‘*Nothing Changed, Nothing Stopped*,’ N.Y. TIMES, Nov. 8, 2011, at B13.

<sup>256</sup> FREEH REPORT, *supra* note 237, at 127 (emphasis added).

that underlies the failure of Penn State's most powerful leaders to respond appropriately to Sandusky's crimes."<sup>257</sup> What is that "Penn State culture"?<sup>258</sup> Specifically, the university should take actions "to create a values- and ethics-centered community where everyone is engaged in placing the needs of children above the needs of adults" and in creating "an environment where everyone who sees or suspects child abuse will feel empowered to report the abuse."<sup>259</sup> The Freeh Report refers to "an over-emphasis on 'The Penn State Way' as an approach to decision-making, a resistance to seeking outside perspectives, and an excessive focus on athletics that can, if not recognized, negatively impact the University's reputation as a progressive institution."<sup>260</sup>

The Freeh Report concludes that "the lack of emphasis on values and ethics-based action created an environment in which Spanier, Schultz, Paterno, and Curley were able to make decisions to avoid the consequences of bad publicity."<sup>261</sup> It further states that "[f]or the past several decades, the University's Athletic Department was permitted to become a closed community," and was "perceived by many in the Penn State Community as 'an island,' where staff members lived by their own rules."<sup>262</sup> The report identified this "avoidance of the consequences of bad publicity . . . [as] the most significant, but not the only, cause for this failure to protect child victims and report to authorities."<sup>263</sup> It also identified a "striking lack of empathy for child abuse victims by the most senior leaders of the University."<sup>264</sup> Indeed, the Freeh Report states that the "the most saddening finding" in its investigation is "the total and consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky's child victims," including "failing to inquire as to their safety and well-being."<sup>265</sup>

Even though Penn State is a public institution, I argue that what this scandal reveals about the risks of "exit" or "opting out," as it were, from ethical norms and values, as well as from state and federal laws, is both instructive and sobering. That sort of lack of accountability worries me when considering rhetoric about nomic communities having no general obligation to obey laws. Lest readers dismiss the Penn State example as "extreme" and thus not particularly probative, consider that the Penn State scandal triggered extensive news reporting on the existence of a "parallel judicial universe . . . at many of the country's colleges and universities" with a history of favoring athletes.<sup>266</sup>

---

<sup>257</sup> *Id.* at 128.

<sup>258</sup> *Id.* at 129.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 130-31.

<sup>262</sup> *Id.* at 139.

<sup>263</sup> *Id.* at 16.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 14.

<sup>266</sup> Bernstein, *supra* note 241.



One article noted that “many serious offenses reach neither campus police officers nor their off-campus counterparts because they are directly funneled to administrators,” who have various ways of “squelching” the reports.<sup>267</sup> In these cases, the victims are not children but college students, usually young women, who allege they have been sexually harassed or sexually assaulted by other students, usually young men. As an officer of one “watchdog” organization, Security on Campus, expresses the problem: “There exists a culture of entitlement for athletes on teams . . . I’m certain it’s a culture that doesn’t only exist at Penn State.”<sup>268</sup>

In addition to the Clery Act, colleges and universities also have obligations under Title IX, such as preventing the creation of a “hostile environment” for accusers.<sup>269</sup> Do they honor these obligations? Since I am focusing on child sexual abuse, it is beyond the scope of this Article to discuss the more general problem of how colleges and universities handle reports of sexual assaults brought by students concerning other students. If recent lawsuits against colleges and universities are any indication, however, there is ample reason to believe that analogs to “rules against scandal” and a lack of sympathy for victims play a part in noncompliance with federal laws and inadequate campus judicial processes.<sup>270</sup>

---

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* (quoting Alison Kiss, executive director of Security on Campus).

<sup>269</sup> See 20 U.S.C. § 1681 (2006); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (explaining that sexual harassment, including the creation of a hostile educational environment, constitutes intentional discrimination within the meaning of Title IX).

<sup>270</sup> On January 22, 2013, the *Daily Tar Heel* reported that Melinda Manning, the former Assistant Dean of Students at the University of North Carolina (UNC), along with three current students and one former student, had filed a complaint with the Department of Education, alleging that UNC had violated the Clery Act and Title IX with its handling of sexual assault cases. Andy Thomason & Caitlin McCabe, *Complaint: UNC Pressured Dean to Underreport Sexual Assault Cases*, DAILY TAR HEEL (Jan. 22, 2013), <http://www.dailytarheel.com/article/2013/01/50f8ca9bc71da>. For example, the complaint alleged that school officials pressured the former dean to underreport the number of sexual assault cases on campus. *Id.* One student, Landen Gambill, faces expulsion for speaking publicly (without naming her rapist) about her frustrating experience with UNC’s campus judicial process, a student-run honor court, when she opted to seek a protective order there rather than resorting to the criminal courts. Nina Strohlic, *Expelled for Speaking Out About Rape?*, DAILY BEAST (Feb. 28, 2013), <http://www.thedailybeast.com/articles/2013/02/28/expelled-for-speaking-out-about-rape.html>. As this Article goes to publication, students at Swarthmore College and Occidental College have also filed complaints under the Clery Act and Title IX, alleging that those institutions are not adequately handling problems of sexual harassment and sexual assault. Richard Pérez-Peña & Ian Lovett, *2 More Colleges Accused of Mishandling Assaults*, N.Y. TIMES (Apr. 18, 2013), <http://www.nytimes.com/2013/04/19/education/Swarthmore-and-occidental-colleges-are-accused-of-mishandling-sexual-assault-cases.html>.

c. *Child Sex Abuse in Other Nomic Communities*

I could add other examples of institutions – nomic communities – content to live by their own “laws” and to treat problems of child abuse secretly until spurred to do otherwise by highly publicized incidents of abuse of children. As I worked on this Article, the Boy Scouts of America (BSA)<sup>271</sup> released the so-called “perversion files.”<sup>272</sup> These files, released pursuant to an order of Oregon’s highest court after attorneys for a boy won an \$18.25 million award against the BSA in 2010, consist of 20,000 pages involving allegations of child sexual abuse from 1965 to 1985.<sup>273</sup> The files include “thousands of incidents of both alleged and confessed sexual abuse,” revealing a cover-up by leaders within the BSA.<sup>274</sup> Some of this cover-up seems to be in violation of mandatory reporting laws.<sup>275</sup> Similar to the Catholic Church and Penn State examples, the secrecy surrounding the abuse and the failure by officials within the BSA to take action against sex offenders put additional children at risk. Concerns for institutional reputation and compassion for the accused – even to the point of writing letters of recommendation for future work – also seem to have resulted in allowing the accused to resign without any public scandal or reporting to public authorities.<sup>276</sup> Since 2010 the Scouts have required members “to report even suspicion of abuse directly to their local authorities.”<sup>277</sup> Like Penn State and the Catholic Church, the BSA commissioned an independent review.<sup>278</sup> In an “Open Letter to the Scouting Community,” BSA’s highest officers indicated that the review shows that, although the BSA system of screening volunteers “functions to help protect

---

<sup>271</sup> Until recently, the BSA barred homosexuals from being scouts or leaders because of its creed of being “clean” and “morally straight.” *Dale v. Boy Scouts of America*, 530 U.S. 640, 650 (2000). The organization has since announced an end to this longtime ban as to openly gay youths, to take effect in January 2014. See Erick Eckholm, *Boy Scouts End Longtime Ban on Openly Gay Youths*, N.Y. TIMES (May 23, 2013), [http://www.nytimes.com/2013/05/24/us/boy-scouts-to-admit-openly-gay-youths-as-members.html?\\_r=0](http://www.nytimes.com/2013/05/24/us/boy-scouts-to-admit-openly-gay-youths-as-members.html?_r=0). It has not, however, changed its policy with respect to adult members and leaders. *Id.*

<sup>272</sup> Gloria Goodale, *Boy Scouts Child Abuse Files: Can the Organization Withstand Their Release?*, CHRISTIAN SCI. MONITOR (Oct. 18, 2012), <http://www.csmonitor.com/USA/Justice/2012/1018/Boy-Scouts-child-abuse-files-Can-the-organization-withstand-their-release-video> (discussing the release of the BSA’s files on child sex abuse).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> Kim Christensen & Jason Felch, *Boy Scouts Helped Alleged Molesters Cover Tracks, Files Show*, L.A. TIMES (Sept. 16, 2012), <http://articles.latimes.com/2012/sep/16/local/la-me-boy-scouts-files-20120916>.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* (quoting BSA spokesman Deron Smith).

<sup>278</sup> See Wayne Perry et al., *An Open Letter to the Scouting Community*, BOY SCOUTS AM. (Sept. 25, 2012), [http://www.scouting.org/sitecore/content/BSAYouthProtection/BSA\\_Communications/IVLetter.aspx](http://www.scouting.org/sitecore/content/BSAYouthProtection/BSA_Communications/IVLetter.aspx).

Scouts[,] . . . in some instances we failed to defend Scouts from those who would do harm.”<sup>279</sup> Similar to the USCCB Charter, the BSA Open Letter apologizes to victims and families for the organization’s “fail[ure] to protect,” admitting that, where some “misused their positions in Scouting to abuse children . . . in certain cases, our response to these incidents and our efforts to protect youth were plainly insufficient, inappropriate, or wrong.”<sup>280</sup>

Greene discusses an agnosticism about values and allowing value competition among groups (nomic or normative communities), and between groups and the state. Here there is a glaring gap between the values that attract people to a particular normative community and the values reflected in the failure to protect children from abuse within that community. “What values does this teach our kids, or anyone else for that matter?” one commentator asks, particularly when the institution doing the cover up “claims to be one of the nation’s most prominent values-based organizations?”<sup>281</sup> Indeed, the BSA enjoys a Congressional charter.<sup>282</sup>

Since Greene discusses an insular Orthodox Jewish community, the Satmar Hasadim, I will close with one final example of the possible risks of arguing against obligation and in favor of maximum protection of competing sources of authority. The example is how the ultra-Orthodox Jewish community in Brooklyn handles sexual abuses cases and the possible complicity of the local prosecutor. In May 2012 the *New York Times* reported:

[A]n influential rabbi came last summer to the Brooklyn district attorney, Charles J. Hynes, with a message: his ultra-Orthodox advocacy group was instructing adherent Jews that they could report allegations of child sexual abuse to district attorneys or the police only if a rabbi first determined that the suspicions were credible.<sup>283</sup>

According to the reporters, although “the pronouncement was a blunt challenge to Mr. Hynes’s authority” – and might violate New York’s reporting laws – the rabbi, Chaim David Zwiebel, “recalled” that Hynes “expressed no opposition or objection.”<sup>284</sup> In a perfect illustration of permeable sovereignty, “[m]any of the rabbis consider sexual abuse accusations to be community matters best handled by rabbinical authorities, who often do not report their conclusions to the police.”<sup>285</sup> Reflecting the “rule of scandal” Hamilton finds in many religions, the reporters note that “[i]nforming on a fellow Jew to a secular authority is traditionally seen as a grave sin, and victims who do come forward

---

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> Goodale, *supra* note 272.

<sup>282</sup> See 36 U.S.C. §§ 30901-30908.

<sup>283</sup> Ray Rivera & Sharon Otterman, *For Ultra-Orthodox in Abuse Cases, Prosecutor Has Different Rules*, N.Y. TIMES, May 11, 2012, at A25.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

can face intense communal intimidation to drop their cases.”<sup>286</sup> Hamilton notes that in the Orthodox community, the rule is “referred to as ‘chilul hashem,’ which literally means ‘desecration of God’s name,’ and is deployed to prohibit giving the community a bad name through revelations about inappropriate bad behavior within the organization.”<sup>287</sup> Perhaps for this reason, until recently, Mr. Hynes’s sex crimes unit had few cases involving ultra-Orthodox Jews, “though experts said the rate of sexual abuse in these communities was believed to occur at the same rate as in society over all.”<sup>288</sup> Although Hynes’s office credits his efforts to reach out to ultra-Orthodox victims of child sexual abuse<sup>289</sup> as leading to “an effective crackdown on child sexual abuse among ultra-Orthodox Jews” and many arrests, critics point out that his office still treats the ultra-Orthodox differently by not publicizing the names of defendants.<sup>290</sup>

This news story triggered predictable reactions, including Mayor Bloomberg making clear that “[a]ny abuse allegations should be brought to law enforcement, who are trained to assess their accuracy and act appropriately.”<sup>291</sup> Nonetheless, contrary to New York law requiring teachers, counselors, and others to report allegations immediately to authorities, Rabbi Zwiebel countered that even a teacher should first go to a rabbi: “‘The rabbis’ consensus is go to a rabbi, because of the stringency of the matter on both sides of the equation, both the Jewish legal implications and because you can destroy a person’s life with a false report.’”<sup>292</sup> Suggestive of the type of pressure people within the ultra-Orthodox community face in raising child sexual abuse claims, Hynes announced he was “setting up a panel of prosecutors and investigators to crack down on witness intimidation in child sexual abuse cases in the borough’s ultra-Orthodox Jewish community”<sup>293</sup> and asking the panel to “‘come up with some alternatives to break down this wall of intimidation.’”<sup>294</sup> Indeed, he remarked:

“The level of intimidation is not found nearly as much in organized crime . . . . It’s extraordinary just how relentless these people can be. There is no

---

<sup>286</sup> *Id.*

<sup>287</sup> Hamilton, *supra* note 179, at 119-20.

<sup>288</sup> Rivera & Otterman, *supra* note 283.

<sup>289</sup> In 2009 Hynes established the program Kol Tzedek (Voice of Justice) in an effort to reach out to child sex abuse victims within the ultra-Orthodox community. *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> Ray Rivera & Sharon Otterman, *Bloomberg Among Critics of Prosecutor in Brooklyn*, N.Y. TIMES, May 12, 2012, at A14 (quoting Mayor Bloomberg).

<sup>292</sup> *Id.* (quoting Rabbi Zwiebel).

<sup>293</sup> Ray Rivera & Sharon Otterman, *Brooklyn Prosecutor to Target Intimidation in Ultra-Orthodox Abuse Cases*, N.Y. TIMES, May 19, 2012, at A16.

<sup>294</sup> *Id.* (quoting District Attorney Hynes).

concern for the victim in parts of these communities . . . . Everything is for the abuser, and that's the horrible thing that we have to deal with."<sup>295</sup>

These various highly publicized instances of institutions failing to protect children by not taking seriously their own obligation to follow state law have triggered a spate of new proposed state laws. These include, for example, amended mandatory reporting laws making clear all the different personnel required to report, removing sovereign immunity, lengthening statutes of limitations, and the like.<sup>296</sup> Such measures arguably aim to reduce people's opportunities to "escape the clutches" of the state with respect to child protection.

#### CONCLUSION

In this Article, I have raised some questions about Abner Greene's arguments against obligation and in favor of agnosticism concerning not only "the good" but also "the right." I have indicated the many matters on which we agree, and I have also highlighted some areas of disagreement. I have explored some implications of his framework for children, a group that hardly appears in his book. In considering the risks of providing groups with robust exemptions from public laws, I have used the example of child sexual abuse and mandatory reporting laws to highlight that the vulnerability of children imposes special obligations on society, including an obligation to protect them from abuse. When institutions are normative communities that families and community members trust and to which they feel loyalty, and when parents entrust their children to such communities, it is deeply disturbing when those institutions violate that trust and fail to protect children. These cases give me reason to resist Greene's arguments in favor of robust rights for members of groups – nomic communities – to live their lives by their own "laws" and escape the clutches of the state whenever practicable. I fear there may be too much agnosticism about when important public values should trump. I would argue that the state, precisely because of its interest in the healthy development of children and in protecting children from harms, is not merely one authority among many competing for our allegiance.

---

<sup>295</sup> *Id.*

<sup>296</sup> See, e.g., *Mandatory Reporting of Child Abuse and Neglect 2012*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/2012-child-abuse-mandatory-reporting-bills.aspx> (last visited May 26, 2013).